

No. 15408

United States
Court of Appeals
For the Ninth Circuit

GRACE & CO. (Pacific Coast),
Appellant,
vs.

PITTSBURGH TESTING LABORATORY, a
Corporation,
Appellee.

Transcript of Record
In Two Volumes

Volume I
(Pages 1 to 270)

Appeal from the United States District Court for the
Western District of Washington,
Northern Division.

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Appeal from the United States District Court for the
Western District of Washington,
Northern Division.

Witnesses, Defendant's (Continued):

Robinson, Parker M.

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| —direct | 357 |
| —cross | 399, 409 |

Witnesses, Plaintiff's:

Gips, Cyril Gregory

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| —direct | 115 |
| —cross | 177 |
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Hargos, Richard

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Hartman, Frank

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Schlaugh, William H.

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| —recross | 310 |

NAMES AND ADDRESSES OF COUNSEL

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San Francisco 4, California, and

BOGLE, BOGLE & GATES,
Central Building,
Seattle 4, Washington,
Attorneys for Appellant.

GRAHAM, GREEN & DUNN;
BENJAMIN J. GANTT, JR.;
FRANK T. ROSENQUIST,
625 Henry Building,
Seattle 1, Washington,
Attorneys for Appellee.

United States District Court, Western District of
Washington, Northern Division

No. 3725

GRACE & CO. (Pacific Coast), a Corporation,
Plaintiff,

vs.

PITTSBURGH TESTING LABORATORY, a
Corporation,
Defendant.

COMPLAINT

The plaintiff alleges:

I.

Plaintiff (formerly known as W. R. Grace & Co.) is a corporation incorporated under the laws of West Virginia, is qualified to do business in the State of Washington and has paid all license fees; and defendant is a corporation, incorporated under the laws of the State of Pennsylvania, and is qualified to do business in the State of Washington. The matter in controversy, exclusive of costs and interest, exceeds the sum of Three Thousand (\$3,000.00) Dollars.

II.

Defendant at all times material was and now is engaged in the business of performing expert and professional services in the testing, surveying, inspecting and certifying of machinery, machinery parts, steel and metals, concrete and materials of all kinds and in respect to the characteristics, stand-

ards, quantity, quality, conformance to specifications and chemical contents and analysis thereof, and hold themselves out as specialized engineers and chemists possessing all the knowledge and skills necessary for the conduct of such a business with laboratories and offices for the purpose of conducting said business in many cities, including Seattle, Washington, and San Francisco, California. On or prior to May 15, 1952, defendant held itself out as possessing sufficient knowledge and skill to inspect, advise and certify as conforming to specifications, 750 steel billets to conform to specifications A.S.T.M. (American Society Testing Materials) designation A.17/29 Type A, Grade 2, Size $9\frac{1}{2}'' \times 4'' \times 4'0\frac{1}{2}''$, and 50 steel billets to conform to specifications A.S.T.M., designation A.17/29 Type A, Grade 1, Size $6'' \times 3'' \times 10'$, to be manufactured according to the aforesaid specifications by the Seattle Foundry Co., Inc., at Seattle, Washington, pursuant to plaintiff's fulfilling and order and an agreement entered into with the New Zealand Government Trade Commissioner, Washington, D. C. acting on behalf of the Government of New Zealand, which steel billets were required for the manufacture of parts for locomotives.

III.

Plaintiff having no knowledge concerning the characteristics or specifications of said steel billets, and relying upon defendant as having sufficient knowledge and skill to properly inspect and certify said steel billets to conform with said specifications and relying upon defendant's statement that it had

such knowledge and skill, made arrangements with the defendant at San Francisco, California, on about May 15, 1952, for the inspection and certifying of the aforesaid steel billets to satisfy itself that said steel billets complied and conformed to specifications, which arrangements were confirmed in writing by the following exchange of letters:

“May 20th, 1952;

“San Francisco, California.

“Pittsburgh Testing Laboratories,

“615 Howard St.,

“San Francisco 5, Calif.

“Inspection of Steel Billets for New Zealand

“Gentlemen:

“We hereby confirm conversation between your Mr. Parker M. Robinson and our Mr. C. G. Gips and we hereby request that you make inspection and deliver certificate of inspection for the following material, which has been ordered by us through our Seattle office with the Seattle Foundry Co. of Seattle:

“750 Billets, Specifications ASTM - A - 17/29,
Type A, Grade 2, size $9\frac{1}{2}'' \times 4'' \times 4\frac{1}{4}''$.

“50 Billets, Specifications ASTM - A - 17/29,
Type A, Grade 1, size $6'' \times 3'' \times 10'$.

which are to be delivered to us between August 15th and September 15th, 1952. Suppliers have already been informed that inspection will be carried out by you.

“Awaiting your early confirmation and acceptance of the above, we are,

“Very truly yours,

“W. R. GRACE & CO.,

“Export Department.

“CGG/ba.”

“May 21, 1952;

“San Francisco, California.

“W. R. Grace & Co.,

“2 Pine Street,

“San Francisco 11, California.

SF 5799

“Attention: Mr. C. G. Gips, Export Dept.

“Subject: Inspection of Steel Billets for
New Zealand.

“Gentlemen:

“This will acknowledge receipt of your letter of May 20th authorizing us to inspect 800 steel billets to be produced at the Seattle Foundry Company in Seattle, Washington.

“As per our verbal agreement the inspection and sampling will be done by our Seattle office on the basis of \$4.00 per hour plus expenses; and the analyses of the samples will be made in our San Francisco Laboratory at \$10.00 per sample, including Carbon, Manganese, Silicon, Phosphorous and Sulphur.

“The expenses will include local mileage in Seattle to and from the foundry at \$0.07 per mile; the cost of shipping samples to San Francisco and

any long distance calls and telegrams, if any should be found necessary.

“Thanking you for this assignment, we remain,

“Very truly yours,

“PITTSBURGH TESTING
LABORATORY,

“/s/ PARKER M. ROBINSON,
“District Manager.

“Parker M. Robinson

“bk

“cc: Seattle
PTG.”

IV.

Defendant undertook to perform its aforesaid written agreement and between June 12, 1952, and September 3, 1952, inspected and furnished certificates of inspection that aforesaid 800 steel billets manufactured by Seattle Foundry Co., Inc., conformed to the aforesaid specifications A.S.T.M., designation A.17/29, and relying on defendant's inspection and certification, plaintiff accepted said material from Seattle Foundry Co., Inc., and delivered the same to the Government of New Zealand pursuant to the aforesaid order. Believing that defendant had fully performed its agreement to inspect and certify said steel billets, plaintiff paid the defendant the sum of Three Thousand One Hundred Fifty (\$3,150.00) Dollars, for said inspection and certification.

V.

Defendant failed to properly inspect and certify said steel billets, and as a result, said steel billets, upon delivery, failed to conform and comply with the aforesaid specifications in the following particulars:

(1) Under standard specifications A.S.T.M., designation A.17/29, it is provided that "Billets shall be purchased as semi-finished rolled or forged material." Whereas said material inspected and certified to by defendant as complying with said specifications, were not billets of a semi-finished, rolled or forged material, but were ingots with sand adhering to their surfaces.

(2) Under standard specifications A.S.T.M., designation A.17/29, it is provided, "Unless otherwise specified, the billets shall be made from ingots of at least three times the cross-sectional area of the billet." Whereas the materials inspected and certified to by the defendant were not billets made from ingots of at least three times the cross-sectional area of the billets, but were ingots of the same size as set forth as the dimensions in the said specifications.

(3) Under standard specifications A.S.T.M., designation A.17/29, it is provided that the steel conform to certain chemical composition for type and grade, whereas the material inspected and certified to by defendant in respect to phosphorous, sulphur and carbon contents were outside the range permissible in said specification.

(4) Under standard specifications A.S.T.M., designation A.17/29, it is provided "The Billets shall be free from injurious defects and shall have a workman-like finish," whereas the materials inspected and certified to by defendant, did not have a workman-like finish and were not free of injurious defects, but contained structural defects and blowholes contrary to said specifications.

VI.

As a direct result of defendant's failure to properly inspect and certify said material, plaintiff has been damaged in the approximate sum of Twenty-six Thousand (\$26,000.00) Dollars.

Wherefore, plaintiff demands judgment against the defendant for said sum of Twenty-six Thousand (\$26,000.00) Dollars, together with interests and costs and disbursements to be taxed herein.

BOGLE, BOGLE & GATES;

By /s/ THOMAS L. MORROW,
Attorneys for Plaintiff.

[Endorsed]: Filed June 8, 1954.

United States District Court, Western District
of Washington, Northern Division

No. 3725

GRACE & CO. (Pacific Coast), a Corporation,
Plaintiff,

vs.

PITTSBURGH TESTING LABORATORY, a
Corporation,

Defendant and Third-Party Plaintiff,

vs.

SEATTLE FOUNDRY CO., INC., a Corporation,
and THOMAS H. WILLIAMS and CHARLES
V. SMITH, Co-Partners, d/b/a NORTH-
WEST LABORATORIES,

Third-Party Defendants.

ANSWER OF DEFENDANT PITTSBURGH TESTING LABORATORY

Comes Now the Defendant, Pittsburgh Testing Laboratory, a corporation, and for Answer to Plaintiff's Complaint, admits, alleges and denies as follows:

I.

Referring to Paragraph I of Plaintiff's Complaint, Defendant admits it is a corporation incorporated under the laws of the State of Pennsylvania and is qualified to do business in the State of Washington; Defendant is without knowledge and infor-

mation sufficient to form a belief as to the truth of the remaining allegations contained in said Paragraph I and, therefore, Defendant denies the same.

II.

Referring to Paragraph II of Plaintiff's Complaint:

Defendant admits all of the allegations contained in the first sentence of said paragraph, except that defendant has no chemical laboratory in its Seattle, Washington, office.

Defendant denies each and every allegation of the second sentence of said paragraph, except that defendant admits and alleges that on or about May 16, 1952, defendant, through its San Francisco, California, office, agreed pursuant to an oral order by telephone from the San Francisco, California, office of W. R. Grace & Co. to inspect by sampling 800 cast steel billets to be manufactured by third-party defendant, Seattle Foundry Co., Inc., at its foundry in Seattle, Washington, 750 steel billets to conform to specifications A.S.T.M., designation A.17/29, Type A, Grade 2, Size $9\frac{1}{2}'' \times 4'' \times 4' 0\frac{1}{2}''$, and 50 steel billets to conform to specifications A.S.T.M., designation A.17/29, Type A, Grade 1, Size $6'' \times 3'' \times 10'$, subject, however, to the understanding with W. R. Grace & Co. that said billets were to be cast steel billets, rather than forged or rolled, since the Seattle Foundry Co., Inc., could not roll or forge steel; that third-party defendant Seattle Foundry Co., Inc., further confirmed and represented to de-

fendant that under the agreement Seattle Foundry Co., Inc., had with W. R. Grace & Co. cast steel billets manufactured by said foundry would be satisfactory to W. R. Grace & Co.; that the inspection and sampling would be done by defendant's Seattle office and chemical analysis would be made by defendant's San Francisco office; that subsequently third-party defendant Seattle Foundry Co., Inc., objected to the delay caused by the chemical analysis being done by defendant's San Francisco office and W. R. Grace & Co. agreed that defendant could provide for chemical analysis at the third-party defendant Northwest Laboratories at Seattle, Washington; that defendant was advised that said cast steel billets were going to the New Zealand Trade Commission, but defendant denies that defendant had any knowledge of the details of the order W. R. Grace & Co. had with the New Zealand Government Trade Commission.

III.

Referring to Paragraph III of Plaintiff's Complaint:

Defendant admits, as set forth in Paragraph II hereof, that on or about May 16, 1952, W. R. Grace & Co., through its said San Francisco office, orally by telephone engaged defendant Pittsburgh Testing Laboratory, through its said San Francisco office, to inspect by sampling the cast steel billets referred to in Paragraph II of this Answer for compliance with the specifications as set forth in said Paragraph II hereof, subject, however, to the under-

standing with W. R. Grace & Co. that said billets were to be cast steel billets rather than forged or rolled billets, since the Seattle Foundry Co., Inc., could not roll or forge steel; defendant further admits receipt of the letter dated May 20, 1952, from W. R. Grace & Co., addressed to defendant, and defendant admits that its said San Francisco office sent the letter dated May 21, 1952, addressed to W. R. Grace & Co.

Except as hereinbefore admitted, defendant denies each and every allegation contained in Paragraph III of Plaintiff's Complaint.

IV.

Referring to Paragraph IV of Plaintiff's Complaint:

Defendant admits that W. R. Grace & Co. paid defendant the sum of Three Thousand One Hundred Fifty (\$3,150.00) Dollars for inspection by sampling in accordance with defendant's oral agreement to inspect cast steel billets, as set forth in Paragraph II of this Answer; defendant specifically denies that its Agreement with W. R. Grace & Co. was a written agreement, and denies that either W. R. Grace & Co. or plaintiff relied upon defendant's inspection and certification that said cast steel billets were rolled or forged or otherwise relied upon defendant's inspection and certification, and defendant further specifically denies that defendant certified that said cast steel billets were rolled or forged; defendant alleges that it fully and prop-

erly performed all its said undertaking under its said oral agreement with W. R. Grace & Co. to inspect by sampling said cast steel billets.

Defendant denies each and every other allegation contained in said Paragraph IV.

V.

Defendant denies that it failed to properly inspect and certify said cast steel billets in accordance with its said oral agreement with W. R. Grace & Co., set forth in Paragraph II of this Answer, and denies that said cast steel billets failed to conform and comply with specifications of the said oral agreement for inspection. Defendant denies that it undertook to inspect and certify rolled or forged materials, and denies that the specifications referred to in subparagraphs 1, 2, 3 and 4 of Paragraph V of Plaintiff's Complaint were specifications included in defendant's said oral agreement with W. R. Grace & Co. to inspect cast steel billets.

VI.

Referring to Paragraph VI of Plaintiff's Complaint, defendant denies that it failed to properly inspect and certify said cast steel billets, and defendant further denies that plaintiff has been damaged in the approximate sum of Twenty-six Thousand (\$26,000.00) Dollars or any other sum whatsoever.

By way of further answer, as a First Affirmative Defense, defendant alleges as follows:

I.

Defendant realleges all of the allegations contained in Paragraph II of Defendant's Answer.

II.

Defendant is informed and believes, and therefore alleges, that W. R. Grace & Co., prior to its oral agreement with defendant to inspect cast steel billets, negotiated with third-party defendant Seattle Foundry Co., Inc., relative to placing an order for said billets, and during said negotiations ascertained that said third-party defendant Seattle Foundry Co., Inc., offered to manufacture said billets much cheaper than other parties; and, further, that W. R. Grace & Co. made inquiry about, and was advised of and well aware of, the difference between forged, rolled and cast material, and at the time of the placing of its said oral order for inspection with defendant was advised and was well aware of the fact that the third-party defendant Seattle Foundry Co., Inc., had no facilities for rolling or forging steel and that it could only furnish cast steel billets.

III.

That W. R. Grace & Co., through its representations and actions at the time that defendant agreed orally to inspect cast steel billets and by its representations and actions thereafter, led defendant to believe that cast steel billets was the material ordered by third-party defendant Seattle Foundry

Co., Inc., and which defendant was to inspect, and W. R. Grace & Co. and plaintiff are estopped from claiming that said material was to be rolled or forged material.

By way of further Answer, as a Second Affirmative Defense and as a Setoff, defendant alleges as follows:

I.

Defendant realleges all of the allegations contained in Paragraphs I, II and III of its First Affirmative Defense.

II.

That W. R. Grace & Co., through its representations and actions at the time that defendant agreed orally to inspect cast steel billets and by its representations and actions thereafter, led defendant to believe that cast steel billets was the material ordered by third-party defendant Seattle Foundry Co., Inc., and which defendant was to inspect, and if, in fact, rolled or forged material was required for plaintiff to fulfill its order and agreement with the New Zealand Government Trade Commissioner, Washington, D. C., acting on behalf of the Government of New Zealand, W. R. Grace & Co. not only failed to advise the defendant that the material was to be forged and rolled, but also indicated at all times that the billets were to be cast steel billets. That in so failing to advise defendant, if such were the case, W. R. Grace & Co. failed to exercise that care and competence in obtaining and communicating information to which defendant was justified

in expecting; and defendant justifiably relied upon the information, advice and actions of W. R. Grace & Co. that the billets were to be cast steel billets, and W. R. Grace & Co. and plaintiff are liable over to defendant for any harm or damages which defendant may suffer by reason thereof which would be the amount of any recovery which W. R. Grace & Co. or plaintiff might otherwise recover in this action against defendant.

Wherefore, defendant Pittsburgh Testing Laboratory prays that Plaintiff's Complaint be dismissed with prejudice and that said defendant have and recover its costs and disbursements herein to be taxed, and that said defendant have such other and further relief as to the Court may be just and equitable in the premises.

GRAHAM, GREEN, HOWE &
DUNN;

/s/ BRYANT R. DUNN,
Attorneys for Defendant, Pittsburgh Testing Laboratory.

Receipt of copy acknowledged.

[Endorsed]: Filed August 2, 1954.

[Title of District Court and Cause.]

PRETRIAL ORDER

As the result of pretrial conferences heretofore held on September 26; October 20, 25 and 27; No-

vember 3, 9 and 10, 1955, in Room 612 of the United States Court House, Seattle, Washington, whereat the Honorable William J. Lindberg presided, the plaintiff Grace & Co. (Pacific Coast), also referred to herein as "Grace," was represented by Thomas L. Morrow and George N. Prince of Bogle, Bogle & Gates, its attorneys, and the defendant and third-party plaintiff Pittsburgh Testing Laboratory, also referred to herein as "Pittsburgh," was represented by Ben J. Gantt of Graham, Green & Dunn, and by James K. S. Ruby, its attorneys, and the third-party defendant Seattle Foundry Co., Inc., also referred to herein as "Foundry," was represented by Lloyd R. Savage and Robert L. Lechner of Savage, Gaines & Lechner, its attorneys, the following issues of fact and law were framed and exhibits identified.

Admitted Facts

The following are admitted facts herein:

1. The plaintiff Grace & Co. (Pacific Coast) was formerly known as W. R. Grace & Co., and plaintiff Grace & Co. (Pacific Coast) and W. R. Grace & Co. at all times material are one and the same corporation, incorporated under the laws of West Virginia and qualified to do business in the State of Washington, having paid its license fees to the State of Washington.

2. The matter in controversy, exclusive of costs and interest, exceeds the sum of \$3,000, and this court has jurisdiction of the said cause herein and jurisdiction of the parties herein.

3. The defendant and third-party plaintiff, Pittsburgh Testing Laboratory, is a corporation incorporated under the laws of the State of Pennsylvania and is qualified to do business in the State of Washington, with offices at San Francisco, California, and Seattle, Washington.

4. The third-party defendant, Seattle Foundry Co., Inc., is a corporation incorporated under the laws of the State of Washington, with its principal place of business at Seattle, Washington, and is engaged in the sale and manufacture of steel products.

5. The defendant and third-party plaintiff, Pittsburgh Testing Laboratory, at all times material was and now is engaged in the business of performing expert and professional services in the testing, surveying, inspecting and certifying of machinery, machinery parts, steel and metals, concrete and materials of all kinds, and in respect to the characteristics, standards, quantity, quality, conformance to specifications and chemical contents and analysis thereof, and hold themselves out as specialized engineers and chemists possessing all the knowledge and skills necessary for the conduct of such a business, with laboratories and offices for the purpose of conducting said business in many cities, including Seattle, Washington, and San Francisco, California, but does not have a laboratory at Seattle, Washington.

6. On about April 30, 1952, W. H. Schlauch of W. R. Grace & Co., Seattle, received an oral quota-

tion from Isaacson Iron Works, Seattle, quoting billets as specified.

7. In May, 1952, plaintiff Grace & Co. (Pacific Coast) sought the services of a firm qualified to inspect and certify steel billets ordered by the New Zealand Government Trade Commissioner in U.S.A., and upon making inquiry the defendant Pittsburgh Testing Laboratory was recommended to Mr. C. G. Gips of Grace & Co., San Francisco, as being qualified to inspect steel products at Seattle, Washington.

8. On July 24, 1952; July 25, 1952, and August 22, 1952, Seattle Foundry Co., Inc., submitted to W. R. Grace & Co., 408 White Building, Seattle, Washington, its invoices for steel products sold W. R. Grace & Co., which invoices were paid by W. R. Grace & Co., Seattle, by cancelled checks Nos. 4504, dated July 25, 1952, in the sum of \$5,517.78; 4507 dated July 28, 1952, in the sum of \$5,822.82; and 4703 dated August 28, 1952, in the sum of \$15,778.56, being plaintiff's Exhibit 36.

9. The Pittsburgh Testing Laboratory, Pittsburgh 30, Pennsylvania, Post Office Box 1646, submitted to W. R. Grace & Co., its invoices No. 62364 dated 6/30/52, No. 72099 dated 7/13/52, No. 82377 dated 8/30/52 and totaling \$3,151.86 for "Inspection of Steel Billets at Seattle Foundry Co., for shipment to New Zealand Government, Trade Commission," which invoices were paid by W. R. Grace & Co. on August 27, 1952; August 28, 1952, and May 19, 1953, respectively, said invoices being marked plaintiff's Exhibit 37.

10. The steel billets produced by Seattle Foundry Co. and ordered by W. R. Grace & Co. and inspected by Pittsburgh Testing Laboratory were shipped to the New Zealand Government Railways Department, Wellington, New Zealand, aboard the SS Waikawa under Bill of Lading No. 2, and aboard the SS Waiheni under Bill of Lading No. 3, said bills of lading being plaintiff's Exhibit 38, and were received in regular course at Wellington, New Zealand, by the New Zealand Government Railways during August and September, 1952.

11. W. R. Grace & Co., San Francisco, submitted its invoices Nos. M-2637 dated July 21, 1952, and M-2897 dated August 27, 1952, to the New Zealand Government Trade Commissioner, Washington, D. C., covering the sale of material delivered to the New Zealand Government Trade Commissioner under his Order No. US-1773, being plaintiff's Exhibit No. 39, and said invoices in the respective amounts of \$15,723.19 and \$21,739.45 were paid October 3, 1952, to W. R. Grace & Co. by the New Zealand Government Trade Commissioner, Washington, D. C.

12. The New Zealand Government Trade Commissioner incurred agency fees and ocean freight and other expenses in connection with the transportation of steel billets sold pursuant to New Zealand Government Trade Commissioner Order No. US-1773, as set forth in Union Steamship Company of New Zealand invoices dated August 15, 1952, and September 19, 1952, and B. R. Anderson & Co. in-

voices dated July 28, 1952, and August 28, 1952, in the respective amounts of \$13.80, \$19.05, \$1,939.49 and \$2,669.85 as set forth in plaintiff's Exhibit 40.

13. The terms "ASTM A-17/29," or "ASTM A-17-29," are the specifications set forth in plaintiff's Exhibit 41 or defendant's Exhibit A-28, said exhibits being true photographs of the American Society for Testing Materials, Standard Specifications for Carbon-Steel and Alloy-Steel Blooms, Billets and Slabs for Forgings published by the American Society for Testing Materials in 1930 covering pages 173 to 177, inclusive.

14. On August 26, 1954, W. R. Grace & Co. paid the claim of the New Zealand Government Trade Commissioner, Washington, D. C., arising out of New Zealand Government Trade Commissioner Order US-1773 by payment of the sum of \$21,747.24 by taking a release dated August 26, 1954, and receipt No. 3376 dated August 27, 1954, from the New Zealand Government Trade Commissioner, and by delivering its check No. 17513, and documents evidencing said payment are set forth in plaintiff's Exhibit 53.

15. The material sold to Grace by Foundry under Foundry invoices dated July 24, 1952, July 25, 1952, and August 22, 1952, being plaintiff's Exhibit 36, and inspected by Pittsburgh for Grace pursuant to services billed for under Pittsburgh invoices Nos. 62364 dated June 30, 1952, 72099 dated July 31, 1952, and 82377 dated August 30, 1952, being plaintiff's Exhibit 37, and purchased by and shipped to the

New Zealand Government Trade Commissioner under Order No. US-1773 did not meet the requirements of specifications ASTM A-17/29 and failed to comply with ASTM specifications in the following respects:

A. Under standard specifications ASTM designation A-17/29, it is provided that "billets shall be purchased as semifinished, rolled or forged material," whereas the 800 billets inspected and approved by defendant Pittsburgh were not a semifinished, rolled or forged material.

B. Under Standard Specification ASTM designation A-17/29, it is provided "a sufficient discard shall be made from each ingot to secure freedom from injurious piping and undue segregation," whereas the material sold by Foundry and inspected and approved by defendant Pittsburgh and sold and shipped to the New Zealand Government Trade Commissioner was not manufactured so as to provide a sufficient discard from each ingot to secure freedom from injurious piping and undue segregation.

C. Under standard specification ASTM designation A-17/29, it is provided "Unless otherwise specified, the billets shall be made from ingots of at least three times the cross-sectional area of the billet," whereas the material sold by Foundry and inspected and approved by defendant Pittsburgh and purchased and shipped to the New Zealand Government Trade Commissioner was not billets made

from ingots of at least three times the cross-sectional area of the billet.

16. The only modifications, changes or amendments occurring after May 21, 1952, in the terms of agreement or terms of employment between plaintiff Grace and defendant Pittsburgh were as follows:

A. On or about June 10, 1952, Grace authorized defendant Pittsburgh Testing Laboratory to have the chemical analysis of the material ordered by plaintiff Grace from Foundry, and being inspected by defendant Pittsburgh, made at the rate of \$15 for each sample, the samples to be taken at Seattle, Washington, by Northwest Laboratories, in lieu of the San Francisco laboratory of defendant Pittsburgh, making the chemical analysis of samples at San Francisco at \$10 per sample. The request that sampling be done at Seattle instead of at San Francisco was made by Mr. James W. Murphy.

B. On or about July 21, 1952, Grace authorized and instructed Pittsburgh to accept eight steel billets under Foundry heat No. 41 which ran a manganese content of .85 instead of allowable limits of .50/.80 as provided for in the chemical requirements of ASTM A-17/29 specifications, and provided said steel billets met all other requirements of the order.

17. The 1951 index to ASTM standards shows A-17 "Discontinued—replaced by specifications A-273, and A-274."

18. The Seattle Foundry Co, Inc., in 1952 owned and operated a foundry in Seattle, King County, Washington; said foundry was equipped to cast steel only; said foundry had no facilities whereby it could forge or roll steel.

19. Foundry heats Nos. 1, 2, 3, 10, 14 and 15 were rejected by defendant Pittsburgh as shown in plaintiff's Exhibit 35 and defendant's Exhibit A-31 and were not included in material delivered to plaintiff Grace.

20. The plaintiff Grace at all times material was engaged in importing and exporting commodities and materials to and from the United States of America and foreign countries and in the regular course of business kept records of transactions in the form of business letters, documents and memoranda, and that plaintiff's Exhibits except 4, 21, 36, 38, 40, 41 and 56 to 63, inclusive, and 67, are records, or authentic copies of records of plaintiff Grace & Co. (Pacific Coast) made in the regular course of business at or near the time of the act, condition or event set forth in the said exhibits and letters and communications were duly sent and received in the regular course of its business.

21. The defendant, Pittsburgh, in the regular course of business kept records of transactions in the form of business letters, documents and memoranda and said defendant's Exhibits A-1, A-3, A-6 to A-11, inclusive, A-13, A-17, A-18, A-19, A-20 and A-31 are records, or authentic copies of records, of

defendant Pittsburgh made in the regular course of business at or near the time of the act, condition or event set forth in the exhibits and all exhibits of letters and communications were duly sent and received. Said defendant's Exhibits A-5, A-12, A-13, A-23, A-27, A-14, A-15, A-21, A-24 and A-26 are records or authentic copies of records of W. R. Grace & Co. made in the regular course of business, made at or near the time of the act, condition or event set forth in said exhibits.

22. Grace based its price quotation to the New Zealand Government Trade Commissioner for the bid on the billets upon the offer of Isaacson Iron Works, and Grace did not recompute its quotation to the New Zealand Government Trade Commissioner based upon the lower price bid from Foundry. Grace reserves an objection to the materiality and relevancy of these admitted facts.

23. Pittsburgh undertook to perform its agreement with Grace and inspected and furnished reports on the inspection of material produced by Foundry.

Contentions in Grace vs. Pittsburgh

Contentions of Grace

(Grace vs. Pittsburgh)

1. On about May 15, 1952, defendant Pittsburgh held itself out to Grace as capable of inspecting steel billets to conform to ASTM A-17/29 specifications with the understanding that said steel billets were

to be manufactured at Seattle Foundry Co., Seattle, Washington, and to be sold to Grace for the purpose of Grace filling an order from the New Zealand Government Trade Commissioner for steel billets of ASTM A-17/29 specifications.

2. Plaintiff having no knowledge concerning the characteristics or specifications of said steel billets, and relying upon defendant Pittsburgh as having sufficient knowledge and skill to properly inspect and certify said steel billets to conform with said specifications, made preliminary arrangements with defendant Pittsburgh at San Francisco, California, on about May 15, 1952, for the inspection and certifying of the aforesaid steel billets. A written contract was then entered into by Grace and Pittsburgh by the following exchange of letters:

“May 20th, 1952,

“San Francisco, California.

“Pittsburgh Testing Laboratories,

“615 Howard Street,

“San Francisco 5, California.

“Inspection of Steel Billets for New Zealand

“Gentlemen:

“We hereby confirm conversation between your Mr. Parker M. Robinson and our Mr. C. G. Gips and we hereby request that you make inspection and deliver certificate of inspection for the following material, which has been ordered by us through our

Seattle office with the Seattle Foundry Co. of Seattle:

“750 Billets, Specifications ASTM A-17/29,
Type A, Grade 2, size $9\frac{1}{2}''$ x $4''$ x $4' \frac{1}{2}''$

“50 Billets, Specifications ASTM A-17/29,
Type A, Grade 1, size $6''$ x $3''$ x $10'$.

which are to be delivered to us between August 15th and September 15th, 1952. Suppliers have already been informed that inspection will be carried out by you.

“Awaiting your early confirmation and acceptance of the above, we are

“Very truly yours,

“W. R. GRACE & CO.,

“/s/ C. G. GIPS,

“Export Department.

“CGG/ba”

“May 21, 1952,

“San Francisco, California.

“W. R. Grace & Co.,

“2 Pine Street,

“San Francisco 11, California.

SF 5799

“Attention: Mr. C. G. Gips—Export Dept.

“Subject: Inspection of Steel Billets for
New Zealand.

“Gentlemen:

“This will acknowledge receipt of your letter of May 20th authorizing us to inspect 800 steel billets

to be produced at the Seattle Foundry Company in Seattle, Washington.

“As per our verbal agreement the inspection and sampling will be done by our Seattle office on the basis of \$4.00 per hour plus expenses; and the analyses of the samples will be made in our San Francisco Laboratory at \$10.00 per sample, including Carbon, Manganese, Silicon, Phosphorous and Sulphur.

“The expenses will include local mileage in Seattle to and from the foundry at \$0.07 per mile; the cost of shipping samples to San Francisco and any long distance calls and telegrams, if any should be found necessary.

“Thanking you for this assignment, we remain

“Very truly yours,

“PITTSBURGH TESTING
LABORATORY,

“/s/ PARKER M. ROBINSON,

“District Manager.

“Parker M. Robinson,

“bk

“cc: Seattle

PTG”

3. Relying on Pittsburgh's contract to inspect and certify steel billets as conforming to ASTM A-17/29 specifications and relying upon services

rendered by Pittsburgh thereunder, Grace accepted said material from Seattle Foundry Co., Inc., and delivered the same to the Government of New Zealand.

4. Defendant failed to properly inspect and certify said steel billets, and as a result, said steel billets, upon delivery, failed to conform and comply with the aforesaid specifications in respects as set forth in paragraph 15 of the Admitted Facts and additionally as follows: Under standard specifications ASTM, designation A-17/29, it is provided, "The billets shall be free from injurious defects and shall have a workmanlike finish," whereas the materials inspected, approved and certified by defendant did not have a workmanlike finish and were not free of injurious defects, but contained structural defects and blowholes contrary to said specifications.

5. As a direct result of Pittsburgh's breach of contract, Grace has been damaged in the sum of Twenty-one Thousand Seven Hundred Twenty-four and 24/100 (\$21,724.24) Dollars, with legal interest at 6% per annum thereon from August 26, 1954, the date of payment of the claim of the New Zealand Government Trade Commissioner.

6. Grace further contends that:

(a) The aforesaid exchange of letters between Grace and Pittsburgh of May 20, and May 21, 1952, constituted an integrated written contract.

(b) Evidence of oral agreements or negotiations

between the parties prior to this written contract may not be received to vary its terms, and

(c) The terms of the contract are plain and may not be varied by parol evidence.

8. Grace further contends that Pittsburgh's duties under its contract with Grace were as follows:

(a) To inspect, approve and furnish a certificate of inspection of a product conforming strictly to the specifications of American Society of Testing Materials A-17/29.

(b) To refer to, consult and follow strictly ASTM A-17/29 specifications while performing services for plaintiff under the aforesaid inspection contract.

(c) To reject materials which failed to conform or comply with specifications ASTM A-17/29.

(d) To certify and report truthfully in respect to materials inspected and accepted by defendant Pittsburgh Testing Laboratory under the aforesaid inspection contract.

(e) To, in a field of specialized knowledge, exercise reasonable care, skill and diligence in the furtherance and advancement of the plaintiff's interest and to implicitly obey plaintiff's instructions.

(f) To advise Seattle Foundry of the requirements of ASTM A-17/29 specifications and insist on Foundry's conformance with specifications.

(g) To make known to plaintiff all material facts coming to defendant's knowledge concerning the subject of defendant's employment.

9. Grace further contends that the amount of \$21,747.24 paid by Grace to the New Zealand Government Trade Commissioner in settlement of its claim is prima facie evidence of the actual loss and damage sustained by Grace as a result of Pittsburgh's breach of its contract with Grace and that the burden of proof is upon Pittsburgh to show facts in mitigation of damages.

10. Grace denies the truth of contentions by Pittsburgh which are in conflict with Grace's contentions and particularly denies that Pittsburgh's contentions support any affirmative defense on a theory of modification, estoppel or negligence or any other valid defense or claim of right or action over against Grace.

11. In reference to Pittsburgh's affirmative defense of estoppel Grace contends that:

(a) Employees of Grace had no knowledge of the characteristics of steel billets or the requirements of ASTM A-17/29 specifications and no knowledge that the product manufactured by Foundry would not conform to ASTM A-17/29, but at all times material relied on defendant Pittsburgh to inspect, approve and certify steel billets so that the final product conformed to ASTM A-17/29 specifications.

(b) Pittsburgh knew or had reasonable means of ascertaining knowledge that the New Zealand Government Trade Commissioner's order with Grace called for steel billets conforming to ASTM A-17/29 specifications and were to be used in parts for the manufacture of locomotives in New Zealand.

(c) Pittsburgh knew or had reasonable means of ascertaining knowledge that Grace's order to Foundry called for a purchase of steel billets conforming to ASTM A-17/29 specifications and that Foundry at all times intended to produce and sell under its contract of sale a product conforming, without exception, to ASTM A-17/29 specifications.

(d) Pittsburgh knew or was charged with knowledge of the characteristics of steel billets and the requirements of specifications ASTM A-17/29, and was under a duty to Grace to inspect and approve material which conformed to specifications and reject material which failed to comply.

12. The contract (plaintiff's Exhibit 20) between Foundry and Grace is immaterial in Grace's action for breach of contract against Pittsburgh.

13. In the event the court considers the contract between Grace and Foundry to be material, then it is Grace's contention that:

(a) Said contract was a written integrated agreement dated May 16, 1952, the terms of which may not be varied by parol evidence.

(b) Grace and Foundry intended that their con-

tract (plaintiff's Exhibit 20) be the single written memorial between the parties.

(c) Foundry's invoices to Grace (plaintiff's Exhibit 36) confirm Foundry's intention to sell and Grace's intention to purchase steel billets conforming to ASTM A-17/29 specifications.

(d) The Foundry letter (plaintiff's Exhibit 23) of May 16, 1952, is parole evidence and inadmissible to vary the terms of Foundry's contract with Grace.

14. Grace further contends that negligence, if any, on its part is no bar to a recovery against Pittsburgh in this action for breach of contract.

Defendant Pittsburgh's Contentions (Grace vs. Pittsburgh)

1. On or about May 16, 1952, Grace, through its San Francisco office, orally by telephone advised Pittsburgh through its San Francisco office, that Grace had ordered from Foundry 750 cast steel billets size $9\frac{1}{2}'' \times 4'' \times 4' \frac{1}{2}''$ to conform insofar as applicable to specifications ASTM designation A-17/29, Type A, Grade 2, and 50 cast steel billets $6'' \times 3'' \times 10'$ to conform insofar as applicable to specifications ASTM A-17/29, Type A, Grade 1, to be manufactured by Foundry at its Seattle plant. At said time and during said telephone conversation Grace orally engaged Pittsburgh to inspect by sampling said cast steel billets for compliance with said specifications insofar as the same were applicable thereto and it was further understood that said

inspection by sampling would constitute inspection for the chemical requirements of specifications ASTM A-17/29 for surface defects and for size as ordered by Grace from Foundry. Grace further orally advised Pittsburgh that said cast steel billets were going to the New Zealand Government Trade Commission but Grace did not advise Pittsburgh as to any of the details of its order with the New Zealand Government Trade Commission. Grace in fact ordered cast steel billets from Foundry to fill its order with the New Zealand Trade Commission.

2. Foundry confirmed and replied to Pittsburgh that under the agreement Foundry had with Grace cast steel billets manufactured by Foundry would be satisfactory to Grace.

3. Pittsburgh fully and properly performed all of its said undertaking under its oral agreement with Grace to inspect by sampling said cast steel billets ordered by Grace from Foundry.

4. Grace, prior to its oral agreement with Pittsburgh to inspect cast steel billets, negotiated with Foundry relative to placing an order for said billets, and during said negotiations ascertained that Foundry offered to manufacture said billets much cheaper than other parties. Grace made inquiry about and was advised of and well aware of the difference between forged, rolled and cast material and at the time of the placing of its oral order with Pittsburgh was advised of the fact that Foundry

had no facilities for rolling or forging steel and it could only furnish cast steel billets.

5. Grace, through its representations and actions at the time Pittsburgh agreed orally to inspect cast steel billets, and by its representations and actions thereafter, lead Pittsburgh to believe that cast steel billets was the material ordered by Grace from Foundry which Pittsburgh was to inspect and plaintiff is estopped from claiming that said material was to be rolled or forged.

6. If rolled or forged material was required by Grace to fulfill its order and agreement with New Zealand Government Trade Commissioner, Grace not only failed to advise Pittsburgh that the material was to be forged or rolled, but also indicated at all times that the billets were to be cast steel billets. In so failing to advise Pittsburgh, if such were the case, Grace failed to exercise that care and competence in obtaining and communicating information to which Pittsburgh was justified in expecting, and Pittsburgh justifiably relied upon the information, advice and actions of Grace that the billets were to be cast steel billets and plaintiff is liable over to Pittsburgh for any harm or damages which Pittsburgh may suffer by reason thereof in the amount of any recovery which plaintiff may make in this action against Pittsburgh.

7. Grace through its own action, negligence or its desire to obtain a much larger profit than usual

itself created or brought about and is solely responsible for the claim of the New Zealand Government.

8. Grace computed its price quotation to the New Zealand Trade Commission (pursuant to invitation to bid) upon the price offer to manufacture of Isaacson Iron Works; such price offer of Isaacson Iron Works was substantially higher than the price offer later accepted by Grace of Seattle Foundry. Grace did not adjust its price after accepting the lower offer of Seattle Foundry but desired to obtain the much larger and unusual profit resulting from the difference. Such substantial difference in price, replies of other suppliers contacted and other information in Grace's possession was such as to have put Grace on notice that the Seattle Foundry Company offer to manufacture was for a different product than the offer to manufacture of Isaacson Iron Works. In fact, Grace was so aware and was on its guard but failed either purposely or otherwise to advise Pittsburgh of such information but to the contrary withheld such information from Pittsburgh and thus created and made possible the claim of the New Zealand Trade Commission. If such information had been furnished to Pittsburgh, as it should have been, Pittsburgh would have been adequately appraised of the fact that forged or rolled billets were required.

9. Since Grace ordered cast steel billets from Foundry, plaintiff has suffered no damages whatsoever.

10. If the court finds Pittsburgh breached its contract with Grace, Grace did not take reasonable steps to mitigate its damages, if any.

11. If the court finds Pittsburgh breached its contract with Grace, the proper measure of damages for said breach is the difference between the value to Grace of what Grace in fact ordered from Foundry and the value of what Grace received from Foundry. In no event should such damage include the additional profit which would result to Grace by reason of furnishing a cheaper product than that called for by the order from the New Zealand Trade Commissioner.

12. That plaintiff cannot recover any special damages arising out of the resale contract with the New Zealand Government Trade Commissioner unless plaintiff can prove that Pittsburgh knew there was no ready supply of steel in the market from which the resale contract could be fulfilled and that the material was ordered by the New Zealand Government Trade Commissioner for locomotive motion parts and coupler heads.

13. Pittsburgh orally advised Grace at the time Grace orally engaged Pittsburgh to inspect 800 cast steel billets that cast steel billets did not meet the specifications of ASTM A-17/29 and Grace advised Pittsburgh at said time and lead Pittsburgh to believe that cast steel billets was the product that had been ordered by the New Zealand Government Trade Commissioner.

Issues of Fact Between Grace and Pittsburgh

1. What are the terms of the contract between Grace and Pittsburgh?

2. Did Pittsburgh comply with or breach the terms of its contract with Grace?

3. If material to the issues between Grace and Pittsburgh, what were the terms of the contract between Grace and Foundry and did Foundry comply with the terms of its contract with Grace?

4. What damages did Grace sustain, if any, as a result of the alleged breach of contract by Pittsburgh?

5. If Grace was required by law under the facts of this case to mitigate damages, what steps did Grace take in mitigation of damages?

6. What conduct of Grace, if any, occurred and was justifiably relied upon by Pittsburgh which estops Grace from asserting its claim against Pittsburgh?

7. Did Grace disclose to Pittsburgh all the facts and information in its possession prior to or at the time of making its agreement with Pittsburgh, or thereafter, which should reasonably have been disclosed to one furnishing services of the character of which Pittsburgh was furnishing? Grace objects to the inclusion of the foregoing statement as an issue of fact, and its objection is hereby reserved until the time of trial.

Issues of Law Between Grace and Pittsburgh

1. What law governs the interpretation and construction of the contract between Grace and Pittsburgh?

2. What was the contract between Grace and Pittsburgh?

(a) Was it oral, or in writing?

(b) Was said contract an integrated written contract?

(c) Is parol evidence admissible to explain or vary the terms of the contract?

3. Did Pittsburgh breach its contract with Grace and, if so, is Pittsburgh liable to Grace?

4. Is the contract between Grace and Foundry material in the issues between Grace and Pittsburgh and, if so, what was the contract and was it complied with?

5. Under the facts of this case is Grace estopped from asserting its claim against Pittsburgh?

6. Assuming Grace's order from the New Zealand Government Trade Commissioner required billets to be rolled or forged, did Grace fail to exercise that care and confidence in obtaining and communicating information to which Pittsburgh was justified in expecting? If so, does this relieve Pittsburgh of liability? Grace objects to the inclusion of the foregoing statement as an issue of law, and its objection is hereby reserved until the time of trial.

7. What is the measure of damages for Pittsburgh's breach of contract with Grace, if any? If Pittsburgh is liable in damages to Grace, was Grace under a duty to mitigate damages and, if so, upon whom is the burden of showing mitigation?

Stipulations

I. Issues of law and of fact which may arise during the course of the trial are hereby reserved by the parties.

II. Objections to written interrogatories addressed to G. S. J. Reed and to D. F. Tomalin shall be limited to those objections of Pittsburgh heretofore served and filed, except Pittsburgh Testing Laboratory waives its objections IX to interrogatory No. 20 to the Reed deposition. The defendant Pittsburgh reserves its right to object to the materiality, relevancy, hearsay and responsiveness of the answers to said interrogatories and cross-interrogatories. This stipulation supersedes the stipulation of the parties of September 9, 1955.

The foregoing pretrial order has been approved by the parties hereto, as evidenced by the signatures of their counsel hereon, and this order is hereby entered, as a result of which the pleadings pass out of the case, and this pretrial order shall not be amended except by agreement of the parties upon order of the court or in the interest of substantial justice.

Dated at Seattle, Washington, this 29th day of November, 1955.

/s/ WILLIAM J. LINDBERG,
United States District Judge.

Approved:

BOGLE, BOGLE, & GATES,

By /s/ GEORGE N. PRINCE,
Attorneys for Plaintiff
Grace & Co.;

GRAHAM, GREEN & DUNN,

By /s/ BEN J. GANTT, JR.,
Attorneys for Defendant and Third Party Plaintiff
Pittsburgh;

SAVAGE, GAINER &
LECHNER,

By /s/ ROBERT L. LECHNER,
Attorneys for Third Party
Defendant Foundry.

[Endorsed]: Filed November 29, 1955.

[Title of District Court and Cause.]

MEMORANDUM DECISION

This is an action by Grace & Co. (Pacific Coast), a corporation, as plaintiff against Pittsburgh Testing Laboratory, a corporation, as defendant. Jurisdiction is based upon diversity of citizenship. The

defendant, Pittsburgh Testing Laboratory, filed a third party complaint against Seattle Foundry Co., Inc., a corporation, and Thomas H. Williams and Charles V. Smith, co-partners, doing business as Northwest Laboratories, third party defendants. Thomas H. Williams and Charles V. Smith, doing business as Northwest Laboratories, were dismissed from the case after pretrial hearing. By oral decision from the bench the action against Seattle Foundry was dismissed after trial although no findings or order has been entered. This memorandum opinion relates only to the principal action of Grace & Co. against Pittsburgh Testing Laboratory.

This memorandum opinion is intended primarily for the information of the parties involved in the action rather than for publication and therefore it would seem unnecessary to outline all the facts and contentions of the parties. They will be referred to so far as is necessary as the court proceeds with the opinion. In the course of this opinion Grace & Co. (Pacific Coast), will be referred to as "Grace"; the defendant, Pittsburgh Testing Laboratory, a corporation, as "Pittsburgh"; the Seattle Foundry Co., Inc., as "Foundry" and New Zealand Government Trade Commission as "New Zealand." Grace alleges a breach of contract and seeks damages. The principal questions to be decided in this litigation are:

(1) What were the terms of the contract between Grace and Pittsburgh?

(2) Did Pittsburgh breach the contract? And

(3) In the event Pittsburgh did breach the contract, what recoverable damage, if any, did Grace sustain as a result thereof?

Grace contends that the contract is represented by the content of two letters exchanged between the parties which constitutes an unambiguous and fully integrated written contract. The letters are in evidence as Exhibits 21 and 22 and read as follows:

“May 20th, 1952.

“Pittsburgh Testing Laboratories,

“615 Howard St.,

“San Francisco 5, Calif.

“Inspection of Steel Billets for New Zealand

“Gentlemen:

“We hereby confirm conversation between your Mr. Parker M. Robinson and our Mr. C. G. Gips and we hereby request that you make inspection and deliver certificate of inspection for the following material, which has been ordered by us through our Seattle office with the Seattle Foundry Co. of Seattle:

750 Billets, Specifications ASTM-A-17/29, Type A, Grade 2, size $9\frac{1}{2}'' \times 4'' \times 4' 1\frac{1}{2}''$.

50 Billets, Specifications ASTM-A-17/29, Type A, Grade 1, size $6'' \times 3'' \times 10'$.

which are to be delivered to us between August 15th and September 15th, 1952. Suppliers have already

been informed that inspection will be carried out by you.

“Awaiting your early confirmation and acceptance of the above, we are

“Very truly yours,

“W. R. GRACE & CO.,

“/s/ C. G. GIPS,

“Export Department.

“CGG/ba”

“May 21, 1952.

“W. R. Grace & Co.,

“2 Pine Street,

“San Francisco 11, California

SF 5799

“Attention: Mr. C. G. Gips—Export Dept.

“Subject: Inspection of Steel Billets for
New Zealand

“Gentlemen:

“This will acknowledge receipt of your letter of May 20th authorizing us to inspect 800 steel billets to be produced at the Seattle Foundry Company in Seattle, Washington.

“As per our verbal agreement the inspection and sampling will be done by our Seattle office on the basis of \$4.00 per hour plus expenses; and the analyses of the samples will be made in our San Francisco Laboratory at \$10.00 per sample, including Carbon, Manganese, Silicon, Phosphorous and Sulphur.

“The expenses will include local mileage in Seattle to and from the foundry at \$0.07 per mile; the cost of shipping samples to San Francisco and any long distance calls and telegrams, if any should be found necessary.

“Thanking you for this assignment, we remain

“Very truly yours,

“PITTSBURGH TESTING
LABORATORY,

“/s/ PARKER M. ROBINSON,
“District Manager.

“Parker M. Robinson

“bk

“cc: Seattle

“PTG”

Pittsburgh contends that the contract between the parties resulted from telephone conversations carried on between Gips, representing Grace, and Clark, representing Pittsburgh, and that the letters—Exhibits 21 and 22—are merely memoranda which do not constitute an integrated contract. Pittsburgh further contends that even should it be found that the letters constitute an integrated contract it is ambiguous and therefore its terms may be explained or interpreted by resort to extrinsic or parol evidence.

The contract having been entered into in California although calling for performance in the State

of Washington the law of California is applicable and controlling in deciding its terms, validity and breach. *Weber Showcase & Fixture Co. v. Waugh*, 42 F. 2d 515; *Williams v. Steamship Mutual Underwriting Ass'n*, 45 W. 2d 209; *Bertonneau v. Southern Pacific Co.*, 17 Cal. App. 439, 120 P. 53. The statutes of California which would appear to have particular bearing on the first question for decision are Sections 1625 and 1639 of the California Civil Code, which read as follows:

“Sec. 1625. The execution of a contract in writing, whether the law requires it to be written or not, supersedes all the negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument.”

“Sec. 1639. When a contract is reduced to writing the intention of the parties is to be ascertained from the writing alone, if possible subject, however, to the other provisions of this title.”

and Sections 1856 and 1860 of the California Code of Civil Procedure as follows:

“Sec. 1856. When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be between the parties and their representatives, or successors in interest, no evidence of the terms of the

agreement other than the contents of the writing, except in the following cases:

“1. Where a mistake or imperfection of the writing is put in issue by the pleadings

“2. Where the validity of the agreement is the fact in dispute.

“But this section does not exclude other evidence of the circumstances under which the agreement was made or to which it relates, as defined in section 1860, or to explain an extrinsic ambiguity, or to establish illegality or fraud. The term agreement includes deeds and wills, as well as contracts between parties.”

“Sec. 1860. For the proper construction of an instrument, the circumstances under which it was made, including the situation of the subject of the instrument, and of the parties to it, may also be shown, so that the Judge be placed in the position of those whose language he is to interpret.”

The foregoing sections of the California statutes have been construed many times by both the California State Courts and the federal courts. Counsel for the parties in lengthy briefs have brought to the court's attention many cases setting forth the application of the law. Reference is made to but a few.

Wells v. Wells,

(Cal App.) 169 P. 2d 23;

Love v. Gulyas,
(Cal. App.) 197 P. 2d 405;

Kreuzberger v. Wingfield,
(Cal.) 31 P. 109;

El Zarape Tortilla Factory v. Plant Food
Corp. (Cal. App.), 203 P. 2d 13;

Wells Fargo Bank & Union Trust Co. v. Mc-
Duffie (9 Cir.) 71 F. 2d 720.

The difficulty we meet in this case is the usual one of applying the law to the facts.

At the outset the court is confronted with the application of the so-called "parol evidence rule." The California law, both statutory and by decision, requires that the rule be strictly adhered to. *Gandelman v. Mercantile Ins. Co. of America*, 187 F. 2nd 654.

In considering the initial issue as to whether the letters or exchange of letters referred to above constituted an integrated written contract between the parties, which issue must be decided before the terms of any agreement can be defined, reference is made to the well-put statement of the applicable rule set forth in Section 228 of the Restatement of the Law, Contracts, as follows:

"An agreement is integrated where the parties thereto adopt a writing or writings as the final and complete expression of the agreement. An integration is the writing or writings so adopted."

In the comment following said section it is stated that:

“It is an essential of an integration that the parties shall have manifested assent not merely to the provisions of their agreement, but to the writing or writings in question as a final statement of their intentions as to the matters contained therein. If such assent is manifested the writing may be a letter, telegram or other informal document. That a document was or was not adopted as an integration may be proved by any relevant evidence.”

While the writings themselves are not controlling in determining whether there was an assent that they constitute a final statement of the parties' intention they are entitled to great weight if the language thereof does tend to establish such an assent. Obviously here such assent is not stated in so many words as might be expected in a formal contract.

However, considering the opening phrase of the letter (Exhibit 21), “We hereby confirm conversations between your Mr. Parker M. Robinson and our Mr. C. G. Gips” and the language immediately following, “and we hereby request that you make inspection and deliver certificate of inspection for the following material,” it seems reasonable to construe that language as not only a recognition by Grace of their earlier telephone conversations but also an indication that any agreement reached is now being incorporated in substance by the request contained in the letter. Referring to the reply from

Pittsburgh (Exhibit 22) after acknowledging Grace's letter authorizing inspection of 800 steel billets, the second paragraph of the letter begins by stating, "As per our verbal agreement the inspection and sampling will be done by our Seattle office on the basis of \$4.00 per hour plus expenses"; etc. This language while not directed to all the terms of the agreement would indicate that Pittsburgh likewise recognized their earlier oral conversations and the language used is consistent with an assent that the letter or writings contain the substance of their preliminary agreements. At least a reasonable interpretation of the language contained in the letters certainly is not inconsistent with a finding that the parties approved the letters as a final statement of their intention as to the matters contained therein.

When the writings are left in search of some indication of the parties' intention with respect to the letters constituting a final statement of their agreement the evidence as to the conduct of the parties and the surrounding circumstances is not particularly helpful on the narrow issue now being considered with one important exception—the notes made by Parker M. Robinson. These notes (Exhibit 67), according to Robinson's testimony, were made by him on May 16, 1952, as a result of a conference with Clark immediately after a telephone conversation between Clark and Gips. Whether so made or whether made as a result of a conference or conversation directly with Gips they contain the significant entry that "Gips will give us a letter." This

evidence would tend to corroborate an interpretation of the language used in the writings themselves that the parties intended that the letters would cover their preliminary oral agreement for services to be rendered by Pittsburgh. It is the conclusion of the court, therefore, that not only the writings themselves but also the conduct of the parties and the surrounding circumstances establish that the parties assented to the letters as a final statement of their agreement. Having so concluded the letters otherwise appear to meet the requirements of a contract.

As to the requirements of a binding contract we find the following statement in 12 Am. Jur., Contracts, §12:

“To be binding, an agreement must be made by competent parties who express definite assent in the form required by law. The agreement must also be supported by a sufficient consideration, must not at the time it is made be obviously impossible of performance, and must not contravene principles of law or public policy so as to be void instead of merely voidable. A subject matter upon which the agreement can operate is sometimes required by statute.”

Here we have a writing complete as to every essential of a contract—parties, assent, form, consideration, subject matter and feasibility of performance. See Restatement of the Law, Contracts, §19, page 24; *Asbury v. Yakima Milling Co.*, 137 Wash. 203, 242 P. 362.

Accepting the letters as a written integrated contract, does it cover the whole transaction or is it so uncertain or ambiguous in its terms as to make it subject to interpretation by resort to extrinsic or parol evidence? It is Pittsburgh's contention that it was orally agreed between Gips and Clark that the inspection would be made of cast steel billets. Pittsburgh argues first that this element of the agreement was not covered by the exchange of letters, and second, that the language of the letters or writings is not clear as to this feature and therefore that the writings are ambiguous and uncertain and under the parol evidence rule the actual subject matter of the contract may be established by extrinsic or parol evidence. They rely on Sections 1856 and 1860 of the California Code of Civil Procedure, *supra*, and the application of these statutes as set forth in *Love v. Gulyas*, (Cal. App.) 197 P. 2d 405; *Wells v. Wells*, (Cal. App.) 169 P. 2d 23, and other California cases.

The rule to be applied in determining this issue is set forth in *Wigmore on Evidence*, 3rd ed., Sec. 2430, the applicable portion of which reads:

“The inquiry is whether the writing was intended to cover a certain subject of negotiation; for if it was not, then the writing does not embody the transaction on that subject * * * Whether a particular subject of negotiation is embodied by the writing depends wholly upon the intent of the parties thereto * * * This intent must be sought * * * in the conduct and

language of the parties and the surrounding circumstances * * * The question being whether certain subjects of negotiation were intended to be covered, we must compare the writing and the negotiations before we can determine whether they were in fact covered * * * In deciding upon this intent, the chief and most satisfactory index for the judge is found in the circumstances whether or not the particular element of the alleged extrinsic negotiation is dealt with at all in the writing. If it is mentioned, covered, or dealt with in the writing, then presumably the writing was meant to represent all of the transaction on that element; if it is not, then probably the writing was not intended to embody that element of the negotiation."

The general view is that the parol evidence rule is a matter of substantive law and not a rule of evidence. Wigmore on Evidence, 3rd ed., §2400; *Producers Livestock Loan Company v. Idaho Livestock Auction, Inc.*, (9 Cir.) filed February 24, 1956, and as yet unreported. California has approved the rule of Wigmore as set forth above. *Simmons v. California Institute of Technology*, 34 Cal. 2d 264, 209 P. 2d 581.

It is abundantly clear from the evidence in this case that an oral agreement was entered into between Grace and Pittsburgh by virtue of the telephone conversations carried on between Gips, representing Grace, and Clark, representing Pittsburgh. It is clear likewise that this agreement called for

the inspection of billets that were ordered from and to be produced by Foundry in Seattle, Washington.

When we examine the letters—first Exhibit No. 21—we find that Gips refers to an inspection and the delivery of a certificate of inspection for the following “material, which has been ordered by us through our Seattle office with the Seattle Foundry Co. of Seattle.” Thereafter is set forth the specifications ASTM-A-17/29.

Pittsburgh’s letter in reply under date of May 21, 1952, opens with the language: “This will acknowledge receipt of your letter of May 20th authorizing us to inspect 800 steel billets to be produced at the Seattle Foundry Company in Seattle, Washington.” Bearing in mind the rule announced from Wigmore it would seem that the particular element of the alleged extrinsic negotiation is dealt with in the letters, the particular element being the “material” or “billets” here involved.

The court must conclude that the writing was intended to include the whole of the transaction.

As to Pittsburgh’s contention with respect to the ambiguity of the language of the letter contract, in Restatement of the Law, Contracts, §230, we find the following:

“The standard of interpretation of an integration, except where it produces an ambiguous result, or is excluded by a rule of law establishing a definite meaning, is the meaning that would be attached to the integration by a rea-

sonably intelligent person acquainted with all operative usages and knowing all the circumstances prior to and contemporaneous with the making of the integration, other than oral statements by the parties of what they intended it to mean.”

Following the standard of interpretation above set forth, the language of the letters or writings in this case when examined in the light of the evidence with respect to the conduct of the parties and the circumstances of the transaction would appear to leave no uncertainty or ambiguity such as would permit parol or extrinsic evidence to explain. When parties integrate their agreement and assent to the writings as an expression of matters to which they agree the terms of the writing are conclusive even if, as may be the case here, the contract may have a meaning different from that which either party supposed it to have. See Comment (b) Restatement of the Law, Contracts, §230.

The ambiguity which Pittsburgh urges, as the court understands their contentions, relates to the article to be inspected. As stated earlier Pittsburgh contends the product to be inspected was cast steel billets. However, when we confine our consideration to the language contained in the letters can we find any ambiguity with respect to the material that was to be inspected? It does not appear so. The material to be inspected apart from its precise nature was without dispute. It consisted of 800 billets ordered from Foundry in Seattle, Washington, under

the specifications set forth. In reality Pittsburgh's alleged ambiguity as it develops seems to be directed to the specifications rather than material to be inspected. Yet the standard or guide against which these billets were to be inspected was plainly set forth as Specification ASTM-A-17/29.

Pittsburgh also contends that in order to make the language of the letters clear and unambiguous as to the specifications to be followed it is necessary to insert the words: "As per" between the words "billet" and "specifications" appearing in the letter from Grace to Pittsburgh, (Exhibit 21). It would seem that a reasonable interpretation of the language set forth in the letter would imply as much without requiring the insertion of the words "as per" as suggested by Pittsburgh.

The evidence makes it clear that Gips at the time the agreement was entered into had little knowledge of steel and it is doubtful if he understood the difference between cast steel billets and billets as called for under the specifications set forth in his letter. Whether Gips should have had knowledge or taken the precaution of securing information as a matter of sound business practice is not in the opinion of the court material to the issue now under consideration. Gips had directed the Grace office in Seattle to secure bids on steel billets according to specifications contained in the New Zealand order. When the Foundry bid had been rechecked and verified by the Seattle office at Gips' request instructions were then sent to Seattle to place the order with Foundry.

Pittsburgh apparently contends that the terms of the contract between Grace and Foundry have some bearing on the terms of the contract between Grace and Pittsburgh. However, Pittsburgh also takes the position that the terms of the Foundry contract were never disclosed to them and the court is unable to see under such circumstances how an ambiguity results with respect to the contract between Grace and Pittsburgh. Also the Grace-Foundry contract was negotiated in Seattle without direct participation by Gips. Therefore, aside from what may have transpired between Foundry and Grace with regard to the provisions or terms of the contract between them there is no evidence from which the court can find that Gips actually had in mind or intended any type of billet except such as would meet specifications ASTM-A-17/29, particularly at the time he was negotiating for the inspection services of Pittsburgh. William W. Clark of Pittsburgh on the other hand being a steel expert knew the difference between a cast steel and forged billet. Because of his wide and expert knowledge of the steel and foundry business on the west coast as well as elsewhere he immediately recognized the probability that Foundry could not manufacture billets other than cast steel billets and apparently assumed, as plaintiff contends he did, that the billets ordered and to be produced were such. Clark testified that in his telephone conversation with Gips he advised Gips that the specifications referred to were obsolete and that Seattle Foundry could make only cast steel billets. Accept-

ing Clark's version of the conversation with Gips such a conversation may tend to prove that Gips had or should have had notice of the limitations of Foundry's capacity to produce the billets in question but it does not follow that Gips had any appreciation of the significance of Clark's statement to that effect. It is quite probable that Clark as well as Robinson assumed that Gips had knowledge of the product they had agreed to furnish New Zealand and a realization of the fact that Foundry could produce only cast steel billets. It is understandable how Clark and Robinson may have been thus misled throughout the whole transaction into the belief that the billets to be inspected were cast steel billets. However, where there is an integration and under the parol evidence rule, this does not render the language of the letters ambiguous nor change the terms of the contract. The contract here involved called for inspection by Pittsburgh of material produced by the Foundry. The material was 750 billets of one grade and 50 billets of another. The specifications were set forth in the letter of Grace to Pittsburgh. If the specifications set forth in the letter had any meaning at all they meant that the billets ordered were to be inspected in accordance with the specifications set forth.

We now come to a determination of what those specifications were and what they meant. The specifications ASTM-A-17/29 as set forth in the official publication according to the interpretation of plaintiff's experts, Hargis and Hartman, call for billets

which have been forged or rolled subsequent to casting. As the court understands the testimony of Robinson and Clark they do not disagree with plaintiff's experts on this issue, if it is assumed that the material involved was not by understanding of the parties "cast steel billets." Certainly there is no language in either one of the letters which states that the material ordered or to be produced is to be cast steel billets. The specifications as set forth in Grace's letter of May 20, 1952 (Exhibit 21), is in the language used in the purchase order of New Zealand, Exhibit 11, and also in the letter of May 15, 1953, from New Zealand to Grace, making claim because of the faulty billets. It is reasonable to assume that Gips when he prepared his letter to Pittsburgh took the description of the billets right from the order he had received from New Zealand. The court does not see under the circumstances how a more definite description of the standard against which the inspection was to be made could be expected. When this language is interpreted without reference to any assumption or without any preconceived idea of what it refers to Robinson agrees that it calls for forged billets. This is indicated by his letter to Grace under date of June 9, 1953 (Exhibit 49), wherein he states as follows:

"By a strict interpretation of ASTM specification A-17/29, sand cast billets without subsequent rolling or forging would not comply."

It is the opinion of the court, therefore, that the integrated contract between Grace and Pittsburgh arising from the exchange of letters was not ambigu-

ous and may not be interpreted by resort to parol or extrinsic evidence.

The next question is, did Pittsburgh breach the contract? It seems unnecessary to consider all the requirements of specification A-17/29 or enter into a detailed discussion of all the obligations of Pittsburgh under the contract. It seems sufficient to say that the contract called for an inspection of billets in accordance with specifications ASTM-A-17/29, Type A, which specification called for forged billets, or to put it more accurately, billets which are forged or rolled subsequent to casting, as distinguished from cast steel billets which are not so forged or rolled. Foundry admittedly had no facilities to forge or roll billets. Pittsburgh in making its inspection reports at no time sought to advise Grace that the billets produced by Seattle Foundry were cast steel billets rather than billets that had been forged or rolled subsequent to casting as called for in the specification. Pittsburgh contending as they do that the material to be inspected under the contract was to consist of cast steel billets cannot seriously contend that they complied with the terms of the contract if the terms of the contract are found, as the court has found, to call for forged or rolled material. While it is contended in substance that Pittsburgh orally advised Grace at the time Gips by telephone engaged Pittsburgh to inspect the cast steel billets that cast steel billets produced by Seattle Foundry would not meet the specification ASTM-A-17/29 and that therefore Grace performed its con-

tract in this regard at that time, such action cannot in the court's opinion be substituted for performance of the terms of a written contract subsequently made.

It is the finding of the court, therefore, that Pittsburgh failed to inspect in compliance with the specifications as set forth in the contract. By so doing they failed to reject materials which did not conform to specifications. Their certification was not as required by the terms of the contract and said contract was thereby breached, resulting in damage to the plaintiff Grace. With respect to Pittsburgh's contentions as to estoppel and negligence on the part of plaintiff which would serve to deny recovery it is sufficient to state that under the evidence and applicable law in this case the contentions appear to be wholly without merit with respect to the first two issues already considered, namely, what were the terms of the contract, and was it breached?

Damages

Having found that Pittsburgh breached its contract with Grace the remaining question is, what damages are recoverable?

Grace admittedly paid Foundry \$27,119.16 for the billets produced under their contract, and Pittsburgh \$3,151.86 for inspection services under the contract already discussed.

Grace was paid under its contract with New Zealand \$37,462.64 for the billets produced by Foundry.

After claim was made by New Zealand against Grace a settlement was negotiated after notice of the claim was given by Grace to both Pittsburgh and Foundry, whereby Grace was allowed a credit of \$15,715.40 for the billets which were retained and payment of \$21,747.24 was made by Grace to New Zealand. Thus, Grace suffered a net out-of-pocket loss of \$14,555.62. As damages Grace seeks recovery of the amount of net loss plus the sum of \$7,192.60, representing profit that would have been realized had the billets produced by Foundry met the specifications and been accepted by New Zealand under its contract with Grace.

Pittsburgh contends that even assuming a breach of its contract with Grace only nominal damages are allowable because the loss suffered by Grace was not the proximate result of Pittsburgh's breach but rather the result of Grace's transaction with Foundry for either Grace contracted with Foundry for cast steel billets and received what they ordered or the contract was for billets in accordance with specifications and if so the loss is proximately attributable to Foundry's breach of its contract.

Counsel have cited many cases in support of their respective contentions. However, these cases are not particularly helpful. They show the application of the general rule of damages as applied to particular cases but few, if any, appear to establish precedent for a measure of damages to be applied to a situation such as presented here.

When the whole transaction is viewed, it is apparent that Grace's loss resulted from their failure to deliver to New Zealand billets in accord with the terms of their contract. The billets were not the type or quality Grace agreed to deliver because they were cast steel billets instead of rolled or forged billets as required under ASTM-A-17/29 specifications. Grace not being a manufacturer or producer of steel but an exporter, had to secure quotations on the billets desired from a producer. The matter was referred by the Washington, D. C., office of Grace, where negotiations with New Zealand were initially undertaken, to the San Francisco office for attention. Gips, who was handling the transaction for Grace in San Francisco, knew little about steel and made inquiry of an acquaintance, Gleason, without undertaking to find out just what the product involved was, as to producers who might be available to fill the order. The San Francisco office of Grace referred the matter to their Seattle office for bids. The Seattle office likewise knew little or nothing regarding the precise nature of the product upon which they sought bids. The first bid or proposal received was from Isaacson Iron Works, who under the evidence knew the nature of the product called for under the specifications set forth in the request for bids and could have produced the billets desired. Upon this proposal Grace quoted New Zealand a price and agreed to deliver the billets. Within a few days the Seattle office of Grace received a quotation from Foundry at a lower price. Under the evidence it appears that Foundry construed the request for

bids as including cast steel billets and quoted prices on that assumption. After the San Francisco and Washington, D. C., offices of Grace were advised of the lower price the Seattle office was requested to recheck with Foundry as to specifications and price and thereafter following telephone and telegraphic communication between the San Francisco and Seattle offices of Grace a letter dated May 16, 1952 (Exhibit 20), purporting to be the Contract of Purchase between Grace and Foundry, was sent Foundry by the Seattle office of Grace. The first paragraph of the letter reads:

“We confirm telephone conversation yesterday wherein we purchased the following Steel Billets for shipment 60/90 days:

“750 Billets, as per Specifications ASTM-A-17/29, Type A, Grade 2, Size $9\frac{1}{2}$ " x 4" x $4\frac{1}{2}$ ", about 515# each at...\$120.00/2000#

“50 Billets, as per Specifications ASTM-A-17/29, Type A, Grade 1, Size 6" x 3" x 10', about 604#, each at.....\$130.00/2000#”

The inspection services of Pittsburgh were sought by Gips after Grace had decided to purchase the billets from Foundry. The Grace-Pittsburgh written contract was negotiated following the contract referred to above between Grace and Foundry. The services of Pittsburgh were not sought to guide or advise Grace in placing their order or in awarding

their contract for the purchase of the billets involved.

Under the facts as they have been briefly outlined it would appear that the damages sought by Grace, apart from the compensation paid Pittsburgh, are the natural and proximate consequence of the breach of contract by Foundry, if such contract called for forged or rolled billets rather than cast steel billets, or in the event said contract did not so provide the natural and proximate consequence of Grace's failure to purchase billets that did meet the specifications of their contract with New Zealand. Can it be reasonably found they are also the proximate consequence of Pittsburgh's breach? See Sutherland on Damages, 4th ed. Section 45.

If the damages sought by Grace are recoverable from Pittsburgh it would appear that it must be under the rule of *Hadley v. Baxendale*, 9 Exch. 341, 156 Eng. Reprint, 145, whereby damages may be recovered if they are such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract.

It is to be noted that the case we have here is not similar to the usual one where the rule of *Hadley v. Baxendale* has been followed to allow recovery such as cases where a sub-contractor undertakes work for a prime contractor, knowing all the provisions and specifications of the principal contract, or those where a manufacturer or supplier contracts to de-

liver equipment or goods to meet the known requirements of the purchaser in connection with contemplated sales or other collateral contracts, such as might be the situation if Grace were seeking the damages involved from Foundry. Neither is the case similar to that of *School Dist. No. 172 v. Josenhans*, 88 Wash. 624, wherein the architect drew the plans and specifications, received bids, awarded the contract and made inspections.

The law of the place of performance governs the measure of compensation to be applied in the event of breach of contract. While the contract here involved was made in California the substantial part, if not all, of the performance occurred in the state of Washington and the law of Washington should apply. *Sutherland on Damages*, (4th ed.) Section 7; *Garcia & Maggini Co. v. Washington Dehydrated Food Co.* (9 Cir.) 294 Fed. 765.

In the comparatively recent case of *Dally v. Isaacson*, 40 W. 2d 574, the supreme court of the State of Washington states:

“(2) The general rule as to damages growing out of a breach of contract is stated in the early English case, *Hadley v. Baxendale* (1854), 9 Ex. 341, 354, 156 Eng. Rep. 151, as follows:

“ ‘Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered

either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated.'

"It has been recognized in 1 Restatement, Contracts 509, § 330, as follows:

" 'In awarding damages, compensation is given for only those injuries *that the defendant had reason to foresee* as a probable result of his breach when the contract was made. If the injury is one that follows the breach in the usual course of events, there is sufficient reason for the defendant to foresee it; otherwise, it must be shown specifically that the defendant had reason to know the facts and to foresee the injury.' (Italics ours.)

"The rule has been adopted in this jurisdiction. *Sedro Veneer Co. vs. Kwapil*, 62 Wash. 385, 113 Pac. 1100; *Martinac vs. Bakovic*, 158

Wash. 193, 290 Pac. 747; *Lewis vs. Jensen*, 39 Wn. (2d) 301, 235 P. (2d) 312.

“(3) Consequential damages are a severe remedy for a breach of contract, for they may, in many instances, exceed the contract price of the goods sold. *Bavaria Inv. Co. vs. Washington Brick, Lime & Sewer Pipe Co.*, 82 Wash. 187, 144 Pac. 68. *Such a measure of damages is to be applied when, and only when, it is made to appear that it was within the contemplation of the parties that the specific damages sought would probably result from a breach of the contract.*” (Italics supplied by district court.)

The rule above set forth was followed and approved in the more recent case of *Lidral vs. Sixth and Battery Corp.*, 147 Wash. Dec. 750 at page 753.

Sutherland on Damages (4th ed.) Sec. 50, after quoting the rule of *Hadley vs. Baxendale* as set forth in the above quotation notes the following caution applicable to the rule:

“It is to be remembered that there is no relaxation of the rule confining the recovery to the damages naturally and proximately resulting from the breach in cases where there are such known special circumstances. Indeed the same strictness exists to confine the recovery to the immediate consequences.”

In referring to the rule confining recovery to the damages naturally and proximately resulting from the breach of contract the author (Sutherland) was

referring to the general rule of damages set forth in Section 45 as follows:

“In an action founded upon a contract only such damages can be recovered as are the natural and proximate consequence of its breach; * * * the damages which are recoverable must be incidental to the contract and be caused by its breach; such as may reasonably be supposed to have been in the contemplation of the parties at the time the contract was entered into. * * * *an important distinction is to be noticed between the extent of responsibility for a tort and that for breach of contract. The wrongdoer is answerable for all the injurious consequences of his tortious act, which, according to the usual course of events and general experience, were likely to ensue and which, therefore, when the act was committed, he may reasonably be supposed to have foreseen and anticipated. But for breaches of contracts the parties are not chargeable with damages on this principle.* Whatever foresight, at the time of the breach, the defaulting party may have of the probable consequences he is not generally held for that reason to any greater responsibility; he is liable only for the direct consequences of the breach, such as usually occur from the infraction of like contracts and were within the contemplation of the parties when the contract was entered into as likely to result from its nonperformance.”

(Italics supplied.)

This statement of the law by Sutherland was

cited and approved in *Lidral vs. Sixth and Battery Corp.*, *supra*.

The serious question presented here with respect to the damages claimed, apart from the application of the principle of proximate consequences, except for the claim for money paid Pittsburgh for services, is whether the specific damages resulting from the delivery of cast steel billets instead of rolled or forged billets as per Specification A-17/29 under the Grace contract with New Zealand as well as with Foundry were within the contemplation of both parties when the contract between Grace and Pittsburgh was entered into as likely to result from its nonperformance.

The statement of the law and reasoning by Justice Holmes in one of his early but often-cited opinions, *Globe Refining Co. vs. Landa Cotton Oil Co.*, 190 U.S. 540, 47 L. ed. 1171, is helpful. It is quoted at length:

“When a man commits a tort he incurs by force of the law a liability to damages, measured by certain rules. When a man makes a contract he incurs by force of the law a liability to damages, unless a certain promised event comes to pass. But unlike the case of torts, as the contract is by mutual consent, the parties themselves, expressly or by implication, fix the rule by which the damages are to be measured. The old law seems to have regarded it as technically in the election of the promisor to perform or to pay damages. *Bromage vs. Genning*, 1 Roll. R.

368; *Hulbret vs. Hart*, 1 Vern. 133. It is true that as people when contracting contemplate performance, not breach, they commonly say little or nothing as to what shall happen in the latter event, and the common rules have been worked out by common sense, which has established what the parties probably would have said if they had spoken about the matter. But a man never can be absolutely certain of performing any contract when the time of performance arrives, and in many cases he obviously is taking the risk of an event which is wholly or to an appreciable extent beyond his control. The extent of liability in such cases is likely to be within his contemplation, and whether it is or not, should be worked out on terms which it fairly may be presumed he would have assented to if they had been presented to his mind. For instance, in the present case the defendant's mill and all its oil might have been burned before the time came for delivery. Such a misfortune would not have been an excuse, although probably it would have prevented performance of the contract. If a contract is broken the measure of damages generally is the same, whatever the cause of the breach. We have to consider therefore what the plaintiff would have been entitled to recover in that case, and that depends on what liability the defendant fairly may be supposed to have assumed consciously, or to have warranted the plaintiff reasonably to

suppose that it assumed, when the contract was made.

“This point of view is taken by implication in the rule that ‘a person can only be held to be responsible for such consequences as may be reasonably supposed to be in the contemplation of the parties at the time of making the contract.’ *Grebert-Borgnis vs. Nugent*, 15 Q.B.D. 85, 92; *Horne vs. Midland Ry. Co.*, L.R. 7 C.P. 583, 591; *Hadley vs. Baxendale*, 9 Exch. 341, 354; *Western Union Telegraph Co. vs. Hall*, 124 U.S. 444, 456; *Howard vs. Stillwell & Bierce Manufacturing Co.*, 139 U.S. 199, 206; *Primrose vs. Western Union Telegraph Co.*, 154 U.S. 1, 32. The suggestion thrown out by Bramwell, B., in *Gee vs. Lancashire & Yorkshire Ry. Co.*, 6 H. & N. 211, 218, that perhaps notice after the contract was made and before breach would be enough, is not accepted by the later decisions. See further *Hydraulic Engineering Co. vs. McHaffie*, 4 Q.B.D. 670, 674, 676. The consequences must be contemplated at the time of the making of the contract.

“The question arises then, what is sufficient to show that the consequences were in contemplation of the parties in the sense of the vendor taking the risk? It has been held that it may be proved by oral evidence when the contract is in writing. *Messmore vs. New York Shot & Lead Co.*, 40 N.Y. 422. See *Sawdon vs. Andrew*, 30 Law Times, N.S., 23. But, in the language

quoted, with seeming approbation, by Blackburn, J., from Mayne on Damages, 2d ed. 10, In Elbinger Acten-Gesellschaft vs. Armstrong, L. R. 9 Q.B. 473, 478, 'it may be asked, with great deference, whether the mere fact of such consequences being communicated to the other party will be sufficient, without going on to show that he was told that he would be answerable for them, and consented to undertake such a liability?' Mr. Justice Willes answered this question, so far as it was in his power, in British Columbia Sawmill Co. vs. Nettleship, L. R. 3 C.P. 499, 508; 'I am disposed to take the narrow view, that one of two contracting parties ought not to be allowed to obtain an advantage which he has not paid for * * * If (a liability for the full profits that might be made by machinery which the defendant was transporting, if the plaintiff's trade should prove successful and without a rival) had been presented to the mind of the shipowner at the time of making the contract, as the basis upon which he was contracting, he would at once have rejected it. And, though he knew from the shippers the use they intended to make of the articles, it could not be contended that the mere fact of knowledge, without more, would be a reason for imposing upon him a greater degree of liability than would otherwise have been cast upon him. To my mind, that leads to the inevitable conclusion that the mere fact of knowledge cannot increase the liability. the knowl-

edge must be brought home to the party sought to be charged, under such circumstances that he must know that the person he contracts with reasonably believes that he accepts the contract with the special condition attached to it.' The last words are quoted and reaffirmed by the same judge in *Horne vs. Midland Ry. Co.*, L. R. 7 C.P. 583, 591; S.C., L. R. 8 C.P. 131. See also Benjamin, Sale, 6th Am. ed. § 872."

As the court views and weighs the evidence it is established that the only knowledge Pittsburgh had of the contract between Grace and Foundry at the time the inspection contract was entered into was the information given by Gips to Clark over the telephone and the letter received from Gips (Exhibit 21). While the court has already found that Clark's conversation over the telephone with respect to Foundry's lack of capacity to make other than cast steel billets could have no bearing on the terms of the written contract between Pittsburgh and Grace the court does believe that such conversation occurred as testified to by Clark and that evidence does have some bearing on the issue of damages particularly as to what was within the contemplation of the parties.

The penciled notes of Clark (Exhibit A-1) made at the time of the preliminary telephone conversation with Gips tend to corroborate his testimony that it was his understanding that the contract with Foundry called for cast steel billets. To the same

effect is the inter-office correspondence of Pittsburgh (Exhibit A-3) between Clark and their Seattle office under date of May 17, 1952. This evidence while inadmissible to vary the terms of the written contract is admissible and relevant to the issue of what was within the contemplation of the parties, with respect to the special damages now being claimed, at the time the contract was entered into. *Globe Refining Co. vs. Landa Cotton Oil Co.*, *supra*; *Messmore vs. New York Shot & Lead Co.*, 40 N.Y. 422; *Sutherland on Damages* (4th ed.) Sec. 51. There can be no question under the evidence that the specific or special damages claimed arose from the delivery by Grace to New Zealand of cast steel billets instead of forged or rolled billets in accordance with the specifications in all three of the contracts or purported contracts here involved.

Counsel for plaintiff has taken the position that Pittsburgh in seeking to perform its contract assumed from the beginning that the material to be furnished was cast steel billets instead of billets meeting the specifications ASTM A-17/29 as provided for under the terms of the written contract. The court, as already indicated, agrees that such was the situation, but if so how can it be reasonably contended that a result, namely damage because of furnishing cast steel billets, which is inconsistent with such assumption was within the contemplation of the defendant, Pittsburgh, when they agreed to inspect the billets to be produced by Foundry? While it may be immaterial, considering Grace's

knowledge of what would be produced by Foundry as distinguished from what was called for under the specification ASTM A-17/29 referred to in their contract with Foundry, Gips does not admit that Clark told him of Foundry's lack of capacity to produce other than cast steel billets. His lack of recollection, however, is not adequate reason in view of the corroborating circumstances with respect to Mr. Clark's version, to justify the court in accepting his statement as against that of Clark. Thus the court must find that Gips, if not actually aware at least should have been at the time of the preliminary negotiations with Pittsburgh that billets produced by Foundry would be cast steel billets although as stated earlier Clark's statement may have made little impression upon him.

Other evidence that would serve to establish that Grace should have known that the billets to be furnished by Foundry would be cast steel billets is to be found in connection with the negotiations between Schlauch of Grace's Seattle office and Murphy of Foundry. Murphy testified that he had advised Schlauch by telephone prior to the placing of the order that the Foundry would furnish billets "cast in sand mold" or "sand-cast" billets. Schlauch had no independent recollection of this part of the conversation. However, at the time conversation occurred Schlauch testified he had no knowledge of the difference between cast steel or sand-cast billets as distinguished from forged or rolled billets. He,

as well as Gips, was relying on the producer or bidder to bid in accordance with the specifications. Further, to corroborate Murphy's testimony, Schlauch in following his custom of making notes of telephone conversations made a note in his journal (Exhibit 54) on page 55 of a conversation with Murphy late in April or early in May, 1952, and such entry shows the words "Sand Cast."

Exhibit 23, a letter from Foundry to Grace, attention of Schlauch under date of May 16, 1952, and received by Grace in Seattle on May 19, and copy that day sent to San Francisco, reads as follows:

"We have just been informed of receiving the steel billet job as quoted in our letter of May 13, 1952. It is our intention to pour these billets in sand molds. We are wondering what taper you will allow us to draw the pattern out of the sand. We intend to pour both sizes flat, therefore, the taper will be on the 4" sides of Item No. 1 and the 3" sides of Item No. 2.

"The steel is to be ASTM A-17/29. This is a ASTM specification put out in 1929. As listed in Kent's Mechanical Engineering Handbook, the composition is as follows:

"ASTM A-17/29, Type A, Grade 2:

| | | |
|---------------|-----|------|
| "Carbon | .15 | .25 |
| "Manganese | .50 | .80 |
| "Phos. max. | | .045 |
| "Sulphur max. | | .05 |

Grade 1:

| | | |
|---------------|------|-----|
| "Carbon | .05 | .15 |
| "Manganese | .50 | .80 |
| "Phos. max. | .045 | |
| "Sulphur max. | .05 | |

"No other requirements were listed, physical or chemical.

"Will you kindly verify the above."

This letter, which clearly indicates to anyone having knowledge of steel products that Foundry intended to furnish cast steel billets, was read by Gips to Clark over the telephone at or about the time of the exchange of letters between Grace and Pittsburgh which constitute the contract here involved. Regardless of how uninformed Schlauch, Vanderbilt or Gips were of the significance of the language used in the letter, its content gave reason for one such as Clark of Pittsburgh to believe that the product to be produced by Foundry was cast steel billets.

Other evidence of similar import to that referred to can be found in the record. Without further detailing the evidence under the facts and circumstances at the time the contract was entered into, as disclosed by all the evidence in this case, it is the opinion of the court that, except for the item of compensation paid Pittsburgh for services, the damages claimed by Grace were not the direct and proximate consequence of the breach of contract by Pittsburgh nor within the contemplation of both parties

at the time the contract was entered into as a likely consequence of its nonperformance. Grace is not entitled to such damages as claimed for the reasons already set forth.

As to the item of \$3,151.86 paid Pittsburgh for its inspection services under the contract it is allowed to Grace with interest at the legal rate from August 26, 1954, as damages. Grace was called upon under the terms of the contract to pay that sum for services which were not performed in accordance with the terms of their contract and which under the evidence were of little or no benefit or value to Grace. 15 Am. Jur. § 44; Board of County Commissioners of Allen County vs. Baker, 152 Kan. 164, 102 P. 2d 1006; Norm Adv., Inc., vs. Monroe St. Lbr. Co., 25 W. 2d 391.

Findings of Fact, Conclusions of Law and Judgment may be presented in accordance with this memorandum opinion, upon notice.

Dated May 17, 1956.

/s/ WILLIAM J. LINDBERGH,
United States District Judge.

[Endorsed]: Filed May 17, 1956.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause came duly and regularly on for trial before the undersigned judge of the above-entitled court on the 29th day of November, 1955, upon plaintiff's complaint and the amended third party complaint of the defendant, Pittsburgh Testing Laboratory. Plaintiff appeared by its attorneys, Thomas L. Morrow and George Prince of Bogle, Bogle & Gates. Defendant, Pittsburgh Testing Laboratory, appeared by its attorneys, Ben J. Gantt, Jr., and Frank T. Rosenquist of Graham, Green & Dunn. Third party defendant, Seatte Foundry Co., Inc., appeared by its attorneys, Lloyd R. Savage and Robert L. Lechner of Savage, Gaines & Lechner. Evidence on behalf of plaintiff, defendant and third party defendant having been introduced, and the court, having heard the arguments of counsel on behalf of plaintiff, defendant and third party defendant and having considered briefs filed by all parties, thereafter rendered its written memorandum decision on May 17, 1956, and having considered the plaintiff's motion for rehearing and clarification of the memorandum decision, denied the same; the court, having been and now being fully advised in the premises, does hereby make the following

Findings of Fact

I.

The plaintiff, Grace & Co. (Pacific Coast), is a corporation organized under the laws of West Virginia and was engaged at all times herein mentioned in the operation of an export and import business and maintained offices throughout the United States, including Washington, D. C.; San Francisco, California, and Seattle, Washington. Grace & Co. (Pacific Coast) was formerly known as W. R. Grace & Co. and at all times material the two companies were one and the same corporation and will be referred to herein as "Grace."

II.

The defendant, Pittsburgh Testing Laboratory, herein called "Pittsburgh," is a corporation organized under the laws of the State of Pennsylvania and was authorized to do business in the State of Washington, and was during all of said times engaged in the business of performing expert and professional engineering services in the testing of materials as to qualities and characteristics, and in the certifying of steel and other products as conforming to contract specifications. Pittsburgh at all times herein mentioned was a member of the American Society for Testing Materials, which is and was an organization of persons and corporations, the purpose of which was to determine and provide a standard of specifications for materials acceptable to manufacturers and purchasers alike.

The Society publishes specifications for various materials in Yearbooks which are for use of and reference by inspectors, such as defendant Pittsburgh and others, in determining and following the specifications of designated materials.

III.

The Seattle Foundry Co., Inc., herein called "Foundry" is a corporation organized under the laws of the State of Washington and engaged in the foundry business in Seattle, Washington, in the production of steel products, not including, however, rolled or forged steel products, for which it had no facilities.

IV.

The matter in controversy, exclusive of costs and interest, exceeds the sum of Three Thousand Dollars (\$3,000.00).

V.

In 1952 an inquiry was received by Grace in Washington, D. C., from the Embassy in New Zealand for material specifically described as follows:

(1) Steel Billets—Specifications ASTM-A-17/29, Type A, Grade 2 or nearest equivalent. Dimensions, $9\frac{1}{2}'' \times 4'' \times 4\frac{1}{2}'$. Quantity—750 billets.

(2) Billets, same specifications. Grade 1 or nearest equivalent. Dimensions $6'' \times 3'' \times 10'$. Quantity—50 billets.

VI.

On April 3, 1952, the Washington, D. C., office of Grace wrote its San Francisco office requesting the San Francisco office to obtain quotations on the aforesaid items required by the Embassy in New Zealand. On April 17, 1952, the San Francisco office of Grace wrote its Seattle office requesting them to secure an offer on material as specified by New Zealand. Mr. William Schlauch, employed by Grace in Seattle, sent out letters to various producers of steel, including Isaacson Iron Works and third party defendant Foundry, requesting offers on steel billets as per specifications which were attached and which specifications corresponded identically in size, specifications and quantity sought by the Embassy of New Zealand. Mr. Schlauch received a quotation from Isaacson quoting Item (1) at \$157.50 per 2,000 pounds and Item (2) at \$178.50 per 2,000 pounds, which offer was transmitted to the San Francisco office of Grace on May 1, 1952, where it came to the attention of Mr. C. E. Gips, who was handling the transaction for Grace at San Francisco. Mr. Gips computed a profit on the basis of the Isaacson offer and on May 6, 1952, wrote his Washington, D. C., office quoting Item (1) as specified at \$168.35 f.a.s. Seattle per 2,000 pounds, and Item (2) at \$190.61 f.a.s. Seattle per 2,000 pounds. This offer was transmitted to the New Zealand Government Trade Commissioner at Washington, D. C., acting on behalf of the New Zealand Government, and the Trade Commissioner on May 9, 1952, issued a purchase offer which was accepted by Grace about

March 12, 1952, and which called for the purchase of the above-specified material setting forth the quantity, specifications, type, grade, size and weight and the price of the material, which called for the delivery in the third quarter of 1952 f.a.s. Seattle.

VII.

Between April 23 and May 1, 1952, Foundry, having misplaced Grace's inquiry for an offer on steel billets, requested, and Grace on May 1, 1952, furnished an additional copy of the specifications. On May 2, 1952, Foundry wrote Grace quoting prices of \$120 per net ton on Item (1) and \$175 per net ton on Item (2) setting forth the size, specifications, grade, type and quantity of steel billets as required by Grace to fill its prospective order from New Zealand. In a telephone conversation between Mr. J. W. Murphy of Foundry and Mr. Schlauch at about this time, Mr. Murphy advised Mr. Schlauch that these billets are "cast steel from sand molds." On May 8, 1952, Mr. Schlauch wrote to his San Francisco office setting forth the Foundry offer, passing along the advice that the billets were "cast steel from sand molds." Mr. Gips on May 9 wrote his Seattle office requesting a check on all figures, specifications and grades mentioned in the two quotations and requesting a confirmation the first thing on May 12th, which was a Monday, that the information was absolutely without fault. He followed this up with a teletype at noon on the 12th and at the same time, Mr. Schlauch replied by teletype that the Foundry confirmed Item (1), Grade 2, and Item (2), Grade 1, and that

its quotation was "in order." On May 13, 1952, Mr. Gips teletyped his Seattle office regarding the extension of offers of Isaacson and Foundry and received back a teletype advising that both suppliers extended their offers to May 16, 1952, as requested.

VIII.

The Seattle office of Grace, following receipt of instructions from its San Francisco office, orally advised Foundry of the acceptance of Foundry's offer and formally reduced the agreement to writing dated May 16, 1952, and which writing appears as follows:

"W. R. Grace & Co.,

"Seattle 1, Wash.

"May 16, 1952.

"Seattle Foundry Co.,

"344-13th Avenue S.W.,

"Seattle, Washington.

"Attention: Mr. J. W. Murphy.

"Gentlemen:

"We confirm telephone conversation yesterday wherein we purchased the following Steel Billets for shipment 60/90 days:

"750 Billets, as per Specifications ASTM-A-17/29, Type A, Grade 2, Size $9\frac{1}{2}$ " x 4" x 4' $\frac{1}{2}$ ", about 515# each at...\$120.00/2000#

"50 Billets, as per Specifications ASTM-A-17/29, Type A, Grade 1, Size 6" x 3" x 10', about 604# each at.....\$130.00/2000#

“The above prices are FOB Seattle Foundry Co. These Billets are to be loaded on flatcars at \$3.00 per 2000# addition.

“This order is covered by Export License #A2-416-10731, expiring October 31, 1952, and the License carries a W2-3QU, 1952 rating.

“We understand you will furnish a plant certificate that the Billets conform to specification. Pittsburgh Testing Laboratories will also inspect these Billets, the cost of which will be for our account.

“Billets will be shipped loose, as no export packing is required.

“We will require the Billets to be marked as follows:

400 Pieces $9\frac{1}{2}'' \times 4'' \times 4' \frac{1}{2}''$.

50 Pieces $6'' \times 3'' \times 10'$.

“N. Z. R. 449, US-1773

“Wellington

“1/Up

350 Piece $9\frac{1}{2}'' \times 4'' \times 4' \frac{1}{2}''$.

“N. Z. R. 449, US-1773

“Port Chalmers

“1/Up

“Please keep us advised as to the progress of this order and when it will be ready for shipment, in order that we may arrange freight space to New Zealand.

“Yours very truly,

“W. R. GRACE & CO.,

“/s/ W. D. VANDERBILT,

“Manager.

“WDV:EB

“P.S. As your acknowledgment will you kindly sign and return one copy of this letter for our records?

“Confirmed and Accepted:

“SEATTLE FOUNDRY COMPANY,

“By /s/ J. W. MURPHY.”

IX.

That thereafter Grace, through its said San Francisco office, made an oral agreement with Pittsburgh, through its said San Francisco office, wherein Pittsburgh agreed to inspect and deliver certificates of inspection covering the steel billets to be produced for Grace by Foundry at its said Seattle, Washington, plant; that in the conversations constituting the oral agreement Pittsburgh advised Grace that Foundry was only equipped to produce “cast steel” billets and had no facilities for rolling or forging billets; thereafter the parties Grace and Pittsburgh entered into a binding and integrated written agreement, the terms of which appear in an exchange of letters appearing as follows:

“W. R. Grace & Co.

“2 Pine Street

“San Francisco 11, Calif.

“Cable address ‘Grace’ Telephone Sutter 1-3700

“May 20th, 1952.

“Pittsburgh Testing Laboratories,

“615 Howard St.,

“San Francisco 5, Calif.

“Inspection of Steel Billets for New Zealand

“Gentlemen:

“We hereby confirm conversation between your Mr. Parker M. Robinson and our Mr. C. G. Gips and we hereby request that you make inspection and deliver certificate of inspection for the following material, which has been ordered by us through our Seattle office with the Seattle Foundry Co. of Seattle:

“750 Billets, Specifications ASTM-A-17/29,
Type A, Grade 2, size $9\frac{1}{2}$ " x 4" x 4' $\frac{1}{2}$ ".

“50 Billets, Specifications ASTM-A-17/29,
Type A. Grade 1, size 6" x 3" x 10'.

which are to be delivered to us between August 15th and September 15, 1952. Suppliers have already been informed that inspection will be carried out by you.

“Awaiting your early confirmation and acceptance of the above, we are

“Very truly yours,

“W. R. GRACE & CO.,

“/s/ C. G. GIPS,

“Export Department.

“CGG/ba”

“Pittsburgh Testing Laboratory

“651 Howard Street

“San Francisco 5, California.

“May 21, 1952.

“W. R. Grace & Co.,

“2 Pine Street,

“San Francisco 11, California.

SF 5799

“Attention: Mr. C. G. Gips, Export Dept.

“Subject: Inspection of Steel Billets for New Zealand.

“Gentlemen:

“This will acknowledge receipt of your letter of May 20th authorizing us to inspect 800 steel billets to be produced at the Seattle Foundry Company in Seattle, Washington.

“As per our verbal agreement the inspection and sampling will be done by our Seattle office on the basis of \$4.00 per hour plus expenses; and the analyses of the samples will be made in our San Francisco Laboratory at \$10.00 per sample, including Carbon, Manganese, Silicon, Phosphorous and Sulphur.

“The expenses will include local mileage in Seattle to and from the foundry at \$0.07 per mile; the cost of shipping sample to San Francisco and any long distance calls and telegrams, if any should be found necessary.

“Thanking you for this assignment, we remain

“Very truly yours,

“PITTSBURGH TESTING
LABORATORY

“/s/ PARKER M. ROBINSON,

“District Manager.

“Parker M. Robinson

“bk

“cc: Seattle

“PTG”

Following receipt of Grace's letter of May 20, 1952, Mr. Robinson wrote Mr. M. E. Johnson of his Seattle office, enclosing a formal inter-office inspection order for the inspection of billets as specified in Grace's order and referring to Grace's letter of May 20, 1952. Among other things, Mr. Robinson advised Mr. Johnson that:

“Since their billets are being shipped to a far-away country, it is of vital importance that your inspection of them be thorough and accurate. If you do not have a competent inspector for this type of work, call in someone who does know, to consult with you.”

That while Grace informed Pittsburgh that the billets were for a customer in New Zealand they did not advise Pittsburgh of the use to be made of the billets nor were the services of Pittsburgh sought to guide or advise Grace in placing their order or awarding a contract for the purchase of the billets involved.

X.

Before production of billets started at Foundry and on May 16, 1952, Foundry wrote to Grace advising it was their intention to pour the billets in sand molds, that the steel was to be ASTM-A-17/29 specifications, setting forth the chemical composition as listed in Kent's Mechanical Engineering Handbook, advising no other requirements were listed, physical or chemical, and requesting a clarification. The letter appears as follows:

“Seattle Foundry Co., Inc.

“Seattle 4, Washington

“May 16, 1952.

“W. R. Grace & Company,

“408 White Building,

“Seattle, Washington:

“Attention: Mr. W. H. Schlauch, Export Department,

“Copy sent S.F.

“L#3270 5/19/52

“Gentlemen:

“We have just been informed of receiving the steel billet job as quoted in our letter of May 13,

1952. It is our intention to pour these billets in sand molds. We are wondering what taper you will allow us to draw the pattern out of the sand. We intend to pour both sizes flat, therefore, the taper will be on the 4" sides of Item No. 1 and the 3" sides of Item No. 2.

"The steel is to be ASTM-A-17/29. This is a ASTM specification put on in 1929. As listed in Kent's Mechanical Engineering Handbook, the composition is as follows:

"ASTM-A-17/29 Type A, Grade 2

| | | |
|---------|-----|-----|
| "Carbon | .15 | .25 |
|---------|-----|-----|

| | | |
|------------|-----|-----|
| "Manganese | .50 | .80 |
|------------|-----|-----|

| | | |
|-------------|------|--|
| "Phos. max. | .045 | |
|-------------|------|--|

| | | |
|---------------|-----|--|
| "Sulphur max. | .05 | |
|---------------|-----|--|

"Grade 1

| | | |
|---------|-----|-----|
| "Carbon | .05 | .15 |
|---------|-----|-----|

| | | |
|------------|-----|-----|
| "Manganese | .50 | .80 |
|------------|-----|-----|

| | | |
|-------------|------|--|
| "Phos. max. | .045 | |
|-------------|------|--|

| | | |
|---------------|-----|--|
| "Sulphur max. | .05 | |
|---------------|-----|--|

"No other requirements were listed physical or chemical.

"Will you kindly verify the above?

"Yours very truly,

"SEATTLE FOUNDRY COM-
PANY, INC.

"/s/ JAMES W. MURPHY.

"JWM:as"

XI.

Upon receipt of the aforesaid letter and on May 19, 1952, Mr. Schlauch wrote his San Francisco office enclosing a copy of the aforesaid letter of May 16, 1952. The letter and enclosure came to the attention of Mr. Gips in San Francisco. Foundry's letter of May 16, 1952, was then read by Gips to Mr. Clark over the telephone. Mr. Clark advised Mr. Gips that their office in San Francisco had contacted their Seattle office and were supplying Pittsburgh's Seattle office with the necessary information to enable them to inspect the material as required, that there was no objection to pouring the billets as proposed by Foundry and that there had been no recent changes or amendments to the ASTM-A-17/29 specifications, confirmed that the analysis for chemical requirements was correct and gave Gips a physical requirement of the specifications for chipping. Clark also advised Gips that the Seattle office of Pittsburgh would inform the Foundry about the chipping requirements or any other requirements. This information and advice from Clark was transmitted by Gips to Grace in Seattle under letter of May 22, 1952. Grace of Seattle then on May 23 acknowledged Foundry's letter of May 16th and authorized the production procedure outlined by Foundry and approved the chemical requirements as listed by Foundry. Also on May 23, 1952, Grace at Seattle wrote to Pittsburgh in Seattle, attention Mr. Johnson, regarding the steel billet order Grace had placed with Foundry and confirmed his understanding that the Pitts-

burgh's San Francisco office would supply Mr. Johnson with the necessary information to make the inspection. There was further misunderstanding concerning the chipping requirements and on June 4, 1952, Mr. Clark in an inter-office communication wrote to Mr. Johnson directly setting forth verbatim shipping requirements from ASTM-A-17/39 (29).

XII.

That the employees of Grace who handled the transactions with Pittsburgh and Foundry had information and knowledge that the billets to be produced at Foundry were "cast steel from sand moulds" and "cast steel billets," although until after the order was completed Grace's employees had no actual knowledge that billets produced by Foundry would not conform to ASTM-A-17/29 specifications.

XIII.

There were no modifications, changes or amendments to the terms of the inspection contract between Grace and Pittsburgh as set forth in Grace's letter of May 20, 1952, and Pittsburgh's letter of May 21, 1952, other than the authorization of Grace on about June 10, 1952, to have the chemical analysis performed at Seattle by Northwest Laboratories at a rate of \$15.00 per each sample, and an authorization on about July 21, 1952, when Grace authorized and instructed Pittsburgh to accept 8 steel billets under Foundry heat #41, which ran a manganese content of .85 instead of allowable limit of .50/.80 as provided for in the ASTM-A-

17/29 specifications, and provided said steel billets met all other requirements of the order.

XIV.

During the course of production of billets at Seattle Foundry, Pittsburgh rendered reports to Grace referring to the specifications ASTM-A-17/29. In its last report dated September 23, 1952, on final inspection of billets, Pittsburgh reported, "The billets were inspected in accordance with physical requirements per ASTM-A-17/29." Pittsburgh rejected billets for chemical deficiencies when, in their opinion, rejection was warranted, and approved all other billets. Pittsburgh, in making its inspection reports, at no time sought to advise Grace that the billets produced by Seattle Foundry were "cast steel" billets rather than billets that had been forged or rolled subsequent to casting as called for in the ASTM-A-17/29 specifications. Pittsburgh failed to inspect in compliance with the specifications as set forth in their written contract and by so doing they failed to reject materials which did not conform to specifications. Their certification is not as required by the terms of the contract.

XV.

At all times herein mentioned billets in the ferrous industry were defined and known as semi-finish steel, forged or rolled from cast steel ingots; and the expression, "ASTM-A-17/29," was designation of a certain type of steel billet of the content and of the manner of manufacture as set forth in

the official publication of the American Society for Testing Materials as follows (Exhibit 56):

“Standard Specifications for
“Carbon-Steel and Alloy-Steel Blooms,
“Billets and Slabs for Forgings
“A.S.T.M. Designation: A 17-29

“These specification are issued under the fixed designation A 17; the final number indicates the year of original adoption as standard or, in the case of revision, the year of last revision.

“Adopted, 1913; Revised, 1918, 1921, 1929.

“1. The term ‘billet’ is used in these specifications to include blooms, billets and slabs.

“2. (a) These specifications cover billets of carbon and alloy steel. Eight types of steel are covered, one type of carbon and seven types of alloy steels, classification by type being made according to the chemical composition, other than carbon.

“(b) Each type of steel is subdivided into grades according to the carbon content. There are eight grades of carbon steel and seven grades of each type of alloy steel.

“(c) The billets are further divided into two classes, designated Classes I and II. Class I is the standard for all types and grades; and Class II is a special class applicable to Grades Nos. 4 to 8, inclusive, in Type A, and to Grades Nos. 14 to 17, inclusive, in all other types. Class II differs from

Class I in the method of sampling for chemical analysis and in chemical requirements.

“3. Billets shall be purchased as semi-finished rolled or forged material.

“Manufacture

“4. The steel shall be made by either or both the following processes: Open-hearth or electric furnace.

“5. A sufficient discard shall be made from each ingot to secure freedom from injurious piping and undue segregation.

“6. Unless otherwise specified, the billets shall be made from ingots of at least three times the cross-sectional area of the billet.

“Chemical Properties and tests

“7. The steel shall conform to the following requirements as to chemical composition for type and grade:

“(a) Type—The types of steel shall be as indicated in Table I.

“(b) Grade—The carbon ranges for the various grades shall be as follows for carbon and alloy steel:”

The specifications then go on to set forth the specific chemical properties, method of making label analysis, check analysis and other tests. The specifi-

cations further provide for workmanship and finish and provide that the billet shall be free from injurious defects and have a workmanlike finish. Provisions are made for marking and for inspection and rejection.

XVI.

On July 24, 25 and August 22, 1952, Foundry submitted its invoices for steel products sold to Grace under the agreement dated May 16, 1952, and these invoices, totaling \$27,119.16, were paid by Grace.

Pittsburgh submitted its invoices performed pursuant to Grace's letter of May 20, 1952, which invoices totaled \$3,151.86 and which were paid for by Grace.

XVII.

The billets sold by Foundry to Grace and inspected by Pittsburgh were shipped to Wellington, New Zealand, to the New Zealand Government Railways, where and by whom they were received during August and September, 1952.

XVIII.

The billets, following arrival in New Zealand, were inspected by employees of the New Zealand Government and were found not to conform with the ASTM-A-17/29 specifications and the court finds that the billets delivered to New Zealand under its contract with Grace did not conform to ASTM-A-17/29 specifications.

XIX.

On May 15, 1953, New Zealand wrote Grace advising them that steel billets supplied against their order had been examined and found to be faulty in the above-mentioned particulars, and submitted a claim for refund in respect to the defective material computed on the basis of 50% of the value of Item (1), and the value of Item (2) as invoiced, plus the cost of rolling the billets to smaller sizes and inspection charges less the value of the billets in the size to which they would be finally rolled, plus an adjustment on freight, and other shipping charges. On May 22, 1953, Grace furnished Pittsburgh a copy of the aforesaid communication from the New Zealand Government containing such offer, and by letter requested the defendant to state whether or not the claim of New Zealand Government was correct. To this request Pittsburgh on June 9, 1953, acknowledged said billets would not comply with a strict interpretation of ASTM-A-17/29 specifications. Thereafter, following further negotiations, whereby New Zealand's claim against Grace was reduced to the amount of \$21,747.24, Grace paid this amount to New Zealand on August 11, 1954, after taking and obtaining releases from its liability to New Zealand.

XX.

Grace received \$37,462.64 from New Zealand for the billets delivered under its contract and having refunded to New Zealand \$21,747.24, was therefore allowed to retain \$15,715.40. Thus Grace suffered a

net out of pocket loss of \$14,555.62 plus loss of profits of \$7,192.60 which Grace would have realized had the billets conformed to the specifications and been accepted by New Zealand under its contract with Grace.

XXI.

The only damages suffered by Grace as a direct and proximate result of Pittsburgh's breach of its contract with Grace was the sum of \$3,151.86, to wit, the sum paid by Grace for Pittsburgh's said inspection services; that such damages were the only damages which were within the contemplation of both parties at the time said contract was entered into as likely consequence of the non-performance of Pittsburgh's contract to inspect billets produced by Foundry.

XXII.

That Foundry did not make any false representations of material facts to Pittsburgh which were relied upon by Pittsburgh to its damage or detriment.

XXIII.

That any additional facts as found by the court in its written memorandum decision filed herein on May 17, 1956, are hereby incorporated to supplement the findings of facts set forth herein.

From the foregoing Findings of Fact the Court does hereby make the following

Conclusions of Law

I.

This court has jurisdiction of the above-entitled cause, the parties thereto and the subject matter thereof.

II.

Plaintiff is entitled to a judgment against the defendant, Pittsburgh Testing Laboratory, in the sum of \$3,151.86, together with interest thereon at the rate of 6% per annum from August 26, 1954, to the date hereof, together with plaintiff's costs and disbursements herein to be taxed.

III.

Defendant and third party plaintiff, Pittsburgh Testing Laboratory's third party complaint against third party defendant, Seattle Foundry Co., Inc., should be dismissed with prejudice and third party defendants, Seattle Foundry Co., Inc., is entitled to a judgment against defendant and third party plaintiff, Pittsburgh Testing Laboratory, for its taxable costs and disbursements.

Dated this 21st day of September, 1956.

/s/ WILLIAM J. LINDBERG,
United States District Judge.

[Endorsed]: Filed September 21, 1956.

United States District Court, Western District of
Washington, Northern Division

No. 3725

GRACE & CO. (Pacific Coast),

Plaintiff,

vs.

PITTSBURGH TESTING LABORATORY, a
Corporation,

Defendant and Third Party Plaintiff,

SEATTLE FOUNDRY CO., INC., a Corporation,
and THOMAS H. WILLIAMS and CHARLES
V. SMITH, Co-partners d/b/a NORTHWEST
LABORATORIES,

Third Party Defendants.

JUDGMENT

The above-entitled cause came duly and regularly on for trial before the undersigned Judge of the above-entitled Court, sitting without a jury, on the 29th day of November, 1955, upon plaintiff's Complaint and defendant and third party plaintiff Pittsburgh Testing Laboratory's Amended Third Party Complaint. Prior to said trial date said Amended Third Party Complaint against Third Party Defendants, Thomas H. Williams and Charles V. Smith, co-partners, d/b/a Northwest Laboratories, was dismissed with prejudice and the Order of Dismissal thereof was entered herein on October 28, 1955. Plaintiff appeared by and

through its attorneys, Thomas L. Morrow and George Prince of Bogle, Bogle and Gates. Defendant and third party plaintiff Pittsburgh Testing Laboratory appeared through its attorneys, Ben J. Gantt, Jr., and Frank T. Rosenquist of Graham, Green & Dunn. Third party defendant, Seattle Foundry Co., Inc., appeared by and through its attorneys, Lloyd R. Savage and Robert L. Lechner of Savage, Gaines & Lechner. Testimony and other evidence was adduced on behalf of plaintiff, defendant and third party defendant. At the close of the trial of the cause, the Court dismissed with prejudice defendant and third party plaintiff Pittsburgh Testing Laboratory's Amended Third Party Complaint against third party defendant, Seattle Foundry Co., Inc. The cause having been fully argued to the Court and the Court, having considered the briefs filed by all parties, thereafter rendered its written Memorandum Decision on May 17, 1956, and having considered the plaintiff's Motion for Rehearing and Clarification of the Memorandum Decision, denied the same; and the Court, having heretofore made and entered its Findings of Fact and Conclusions of Law herein, and being fully advised in the premises, Now, Therefore,

It Is Hereby Ordered, Adjudged and Decreed as follows:

1. That the plaintiff, Grace & Co. (Pacific Coast), hereby have and recover judgment against the defendant Pittsburgh Testing Laboratory in the sum of \$3,151.86, together with interest thereon at

the rate of 6% per annum from August 26, 1954, to the date hereof, and for plaintiff's costs and disbursements herein to be taxed.

2. That the Amended Third Party Complaint of defendant and third party plaintiff Pittsburgh Testing Laboratory against third party defendant Seattle Foundry Co., Inc., be and the same is hereby dismissed, with prejudice, and the third party defendant Seattle Foundry Co., Inc., have and recover from defendant and third party plaintiff Pittsburgh Testing Laboratory its costs and disbursements herein to be taxed.

Done this 21st day of September, 1956.

/s/ WILLIAM J. LINDBERG,
United States District Judge.

Receipt of copy acknowledged.

Lodged September 7, 1956.

[Endorsed]: Filed September 21, 1956.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Grace & Co. (Pacific Coast), the plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from that part of the judgment rendered in the above-entitled court and cause in favor of the plaintiff Grace & Co. (Pacific Coast) and

against the defendant Pittsburgh Testing Laboratory, and which judgment was entered on September 21, 1956.

WALLACE, GARRISON,
NORTON & RAY,
BOGLE, BOGLE & GATES,

By /s/ THOMAS L. MORROW,
Attorneys for Plaintiff Grace
& Co. (Pacific Coast).

[Endorsed]: Filed October 18, 1956.

[Title of District Court and Cause.]

BOND ON APPEAL

Know All Men by These Presents that we, Grace & Co. (Pacific Coast), as principal, and Fireman's Fund Indemnity Co., as surety, are held and firmly bound unto Pittsburgh Testing Laboratory, the defendant herein, in the full and just sum of \$250.00 to be paid to the Pittsburgh Testing Laboratory, its successors or assigns, to which payment well and truly to be made we bind ourselves and our successors, jointly and severally, by these presents.

Done this 18th day of October, in the year of our Lord One Thousand Nine Hundred and Fifty-six.

Whereas, lately in the above-entitled court and cause a judgment was rendered in favor of the plaintiff Grace & Co. (Pacific Coast) and against

the defendant Pittsburgh Testing Laboratory and the said Grace & Co. (Pacific Coast) filing in said court a notice of appeal from the aforesaid judgment to the United States Court of Appeals for the Ninth Circuit.

Now, therefore, the condition of the above obligation is such, that if the said Grace & Co. (Pacific Coast) shall pay all costs if the appeal is dismissed or the judgment affirmed, or such costs as the Appellate Court may award if the judgment is modified, then the above obligation is to be void, otherwise to be and remain in full force and effect.

GRACE & CO. (Pacific Coast),

By /s/ THOMAS L. MORROW,
One of Its Attorneys of
Record.

[Seal] FIREMAN'S FUND INDEMNITY CO.,

By /s/ CLAUDE E. WAKEFIELD,
Attorney-in-Fact,
Surety.

[Endorsed]: Filed October 18, 1956.

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR FILING
RECORD AND DOCKETING APPEAL

On application of the plaintiff, ex parte, and the Court being fully advised in the premises, it is hereby

Ordered that the time for filing the record on appeal with the United States Court of Appeals for the Ninth Circuit, and for docketing therein the appeal taken by plaintiff by Notice of Appeal filed October 18, 1956, is extended to January 15, 1957, pursuant to Rule 73(g) of the Federal Rules of Civil Procedure.

Done this 16th day of November, 1956.

/s/ WILLIAM J. LINDBERG,
United States District Judge.

Presented by:

/s/ THOMAS L. MORROW, of
BOGLE, BOGLE & GATES,
Attorneys for Plaintiff.

[Endorsed]: Filed November 17, 1956.

[Title of District Court and Cause.]

STATEMENT OF THE POINTS UPON
WHICH APPELLANT WILL RELY

1. The Court correctly found and concluded as follows:

(a) The plaintiff and defendant entered into a binding and integrated and unambiguous written agreement, the terms of which appear in an exchange of letters between plaintiff and defendant dated May 20, 1952, and May 21, 1952, for the inspection and certification of steel billets to conform to the American Society for Testing Materials specification, designated as ASTM A-17-29.

(b) Parol evidence may not be resorted to to interpret or vary the terms of the written contract between the parties.

(c) The defendant breached its contract with plaintiff by failing to inspect in compliance with The American Society for Testing Material specification designated as ASTM A-17-29, by failing to reject cast billets which failed to conform to said specifications, and by failing to make certification of conformance as required by the terms of the written contract.

2. The trial court erred in finding and concluding that the only damages suffered by plaintiff as a direct and proximate result of the defendant's breach of its contract was the sum of \$3,151.86 paid to defendant for inspection services.

3. The trial court erred in failing to find and conclude that as a natural consequence of defend-

ant's aforesaid breach of contract to inspect billets to conform to specifications, plaintiff was damaged in the sum of \$21,747.24, which sum plaintiff paid to New Zealand in satisfaction of the latter's claim against plaintiff as a result of failure of said billets to conform to the same specifications.

4. The court erred in concluding as a matter of law that plaintiff was entitled to a judgment against defendant in the sum of \$3,151.86, together with interests thereon at the rate of 6% per annum from August 26, 1954, and in failing to conclude as a matter of law that plaintiff was entitled to a judgment against defendant in the sum of \$21,747.24, together with interest thereon at the rate of 6% per annum from August 26, 1954.

5. The trial court erred in finding and concluding that damages sustained by Grace in the sum of \$21,747.24 were not within the contemplation of the parties at the time the contract was made, and in finding and concluding that the only damages within the contemplation of the parties was the sum of \$3,151.86 paid by plaintiff to defendant for inspection services.

6. The court erred in finding and concluding that plaintiff's damages in the sum of \$21,747.20 were the natural and proximate consequence of the breach of contract by Foundry or plaintiff's failure to purchase billets meeting the specifications called for in its contract with New Zealand.

7. The trial court erred in admitting parol evidence tending to vary and contradict the terms of

the written agreement between the parties and in considering such evidence in determining the quantum of damages.

8. The court erred in concluding as a matter of law that while parol evidence is inadmissible to vary or contradict the terms of a written contract, nevertheless parol evidence of such a character is admissible in this case on the issue of damages.

9. The trial court erred in finding that the inspection services required by plaintiff were sought by plaintiff after defendant had decided to purchase billets from Foundry and not sought to guide or advise plaintiff in placing its order or in awarding its contract for the purchase of billets to fulfil its order with New Zealand; and in failing to find that the inspection services sought by plaintiff from defendant were tentatively arranged for before defendant decided to place its order with Foundry and for the purpose of assuring Grace that if billets were purchased from Foundry to fill Grace's order with New Zealand, said billets would conform to the New Zealand order and specifications.

WALLACE, GARRISON,
NORTON & RAY,
BOGLE, BOGLE & GATES,

By /s/ THOMAS L. MORROW,
Attorneys for Plaintiff Grace
& Co. (Pacific Coast).

Receipt of copy acknowledged.

[Endorsed]: Filed December 31, 1956.

[Title of District Court and Cause.]

ORDER FOR TRANSMITTING EXHIBITS

Whereas an appeal has been taken in the above-entitled action the Clerk of this Court is hereby directed to transmit exhibits in their original form to the Clerk of the United States Court of Appeals.

Done in Open Court this 31st day of December, 1956.

/s/ WILLIAM J. LINDBERG,
United States District Judge.

Approved for entry:

WALLACE, GRAHAM,
NORTON & RAY,
BOGLE, BOGLE & GATES,

By /s/ THOMAS L. MORROW,
Attorneys for Plaintiff.

GRAHAM, GREEN & DUNN,
By /s/ BEN J. GANTT, JR.,
Attorneys for Defendant.

[Endorsed]: Filed December 31, 1956.

In the District Court of the United States for the
Western District of Washington, Northern Di-
vision

Number 3725

GRACE AND COMPANY (Pacific Coast), a Cor-
poration, Plaintiff,

vs.

PITTSBURGH TESTING LABORATORY, a
Corporation,
Defendant and Third Party Plaintiff,

vs.

SEATTLE FOUNDRY COMPANY, INC., a Cor-
poration, Third Party Defendant.

TRANSCRIPT OF TRIAL PROCEEDINGS
had in the above-entitled and numbered cause, on
the 29th day of November, 1956, commencing at
10:00 o'clock, a.m., at Seattle, Washington, before
the Honorable William J. Lindberg, a United
States District Judge.

Appearances:

THOMAS L. MORROW, and
GEORGE NOTMAN PRINCE, of
BOGLE, BOGLE and GATES,

Appeared for and on Behalf of the Plain-
tiff; and

BEN J. GANTT, JR., and
FRANK T. ROSENQUIST, of
GRAHAM, GREEN, HOWE AND DUNN,

Appeared for and on Behalf of the Defend-
ant and Third Party Plaintiff; and

LLOYD R. STVAGE, and
ROBERT L. LECHNER, of
SAVAGE, GAINES AND LECHNER,

Appeared for and on Behalf of the Third
Party Defendant.

(Whereupon, the following proceedings were
had, to wit:)

Proceedings

The Clerk: Cause Number 3725, Grace and Company, Plaintiff, vs. Pittsburgh Testing Laboratory, Defendant and Third Party Plaintiff, vs. Seattle Foundry Company, Third Party Defendant; Mr. Morrow and Mr. Prince appearing for Plaintiff; Mr. Gantt and Mr. Rosenquist appearing for Defendant and Third Party Plaintiff; and Mr. Savage and Mr. Lechner appearing for Third Party Defendant.

The Court: Is the Plaintiff ready?

Mr. Morrow: The Plaintiff is ready, your Honor.

The Court: Is the Third Party Defendant ready?

Mr. Savage: The Third Party Defendant, Seattle Foundry Company, is ready, your Honor.

Mr. Gantt: The Defendant is ready, your [3*]
Honor.

* * *

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

CYRIL GREGORY GIPS

upon being called as a witness for and on behalf of the Plaintiff, and upon being first duly sworn, testified as follows:

The Clerk: Will you state your full name, please.

The Witness: Cyril Gregory Gips. [56]

* * *

Direct Examination

By Mr. Morrow:

Q. Will you state your—have you been sworn, Mr. Gips? A. I have.

Q. Will you state your name, please?

A. Cyril Gregory Gips.

Q. Your address?

A. 1604 Grand Avenue, San Rafael, California.

Q. Who is your employer?

A. Grace and Co., Pacific Coast.

Q. What job do you now hold with Grace and Company?

A. I am manager of the freight department and assistant manager of the import department.

Q. What was your job—what was your occupation—in 1952?

A. I was trader of the export department.

Q. What experience have you had in exporting and importing prior to 1952?

A. I had worked in that position for W. Grace and Company since approximately July, 1951, and previous to that I had approximately four years

(Testimony of Cyril Gregory Gips.)

experience in South America as trader and office manager. [64]

Q. What were you—what commodities did you deal with in South America? A. Lumber.

Q. And what commodities did you deal with in 1952 and prior thereto after employment by Grace and Company?

A. Various commodities. Do you wish me to state the commodities?

Q. Yes.

A. Fresh fruit, canned food stuffs, some steel items, some fresh vegetables.

Q. What was your principal item that you were handling at that time; lumber?

A. I beg your pardon?

Q. Were you handling lumber at that time?

Mr. Gantt: I object to that as leading.

A. Did I handle lumber?

The Court: Go ahead.

A. (Continuing): Did I handle lumber?

Q. (By Mr. Morrow): Yes.

A. While working for Grace and Company?

Q. Yes. A. No.

Q. The question was: What was the [65] principal commodity? Have you named it already?

A. I think so.

Q. You mentioned you dealt in steel items. What was your experience in steel?

A. Excuse me. I do not kind of understand you.

Q. Well, you handled export of steel?

A. Yes.

(Testimony of Cyril Gregory Gips.)

Q. And you so testified; now, would you just tell us what you did in that respect?

A. We obtained inquiries from mainly our Central American offices for certain steel items which I handled and I would thereupon contact the suppliers and advise them of those inquiries and request them to quote prices.

Q. What were the steel items you were dealing in?

A. Steel bars for construction purposes and oil pipe.

Q. Did you have any steel items such as steel billets or ingots or castings that you dealt with?

A. No.

Q. Do you know the difference between an ingot and a billet? [66]

A. No.

Q. In dealing with your steel bars and the steel items which you dealt with, did you have any ASTM specifications?

A. Yes; each item—the steel pipe and the construction bars—were sold on an ASTM specification.

Q. Did you know the requirements set forth in those ASTM specifications?

A. No.

Q. Now, I would like you to refer to Plaintiff's Exhibit 1.

Mr. Morrow: I would like to offer Plaintiff's Exhibit 1 in evidence at this time.

Mr. Gantt: No objection to Plaintiff's Exhibit 1.

The Court: Plaintiff's Exhibit 1 may be admitted.

(Plaintiff's Exhibit 1 admitted.)

(Testimony of Cyril Gregory Gips.)

Mr. Morrow: Is it all right to hand this to the witness?

The Court: Yes.

Q. (By Mr. Morrow, Continuing): Will you state what Plaintiff's [67] Exhibit 1 is, Mr. Gips?

A. It is a letter from our Grace and Company, Washington office on an inquiry on steel billets for the New Zealand Government.

Q. Was that received by you? A. Yes.

Q. And it is indicated by a receiving stamp when it was received? A. Yes.

Q. When was it received?

A. I beg pardon?

Q. When was it received?

A. On April 7, 1952.

Mr. Morrow: Thank you. Your Honor, I don't know whether I should take up the time to read this in evidence. It is quite an important thing. It is the start of this inquiry.

The Court: You might, if you wish; or, you can hand it to me. I can read it.

Mr. Morrow: Very well. [68]

* * *

Q. Now, following receipt of your inquiry from your Washington office, Plaintiff's Exhibit 1, which you may look at, do you recall what you did in response to that inquiry? A. Yes.

Q. What did you do?

A. I contacted the Company's steel relations or relations in the steel business to find out who would be a possible supplier for this type of material.

(Testimony of Cyril Gregory Gips.)

Q. And what information did you receive, if you recall?

A. I received information that two companies——

Mr. Gantt (Interposing): Objection. From whom did he receive the information?

Mr. Morrow: He said from——

Mr. Gantt: (Interposing): How, and what time, and what place?

A. (Continuing): I called by 'phone Mr. Gleason, export manager of Kaiser Steel [83] Corporation with whom I was in regular contact, and asked him who would be able to supply this type of material and he suggested two names to me, Seidelhuber and Isaacson Iron Works up in the Northwest.

Q. (By Mr. Morrow): Now, referring to Plaintiff's Exhibit 2, can you state what that is?

A. Yes. That is a letter I wrote to our Grace Seattle office requesting them to obtain an offer for the material I have described in the letter up in their area and suggesting to them that—to contact two people mentioned herein. [84]

* * *

Q. Did you receive a response to the inquiry for quotations from your Seattle office, Mr. Gips?

A. I did.

Q. Referring you to Plaintiff's Exhibit 5, is that the response you received from your Seattle office?

A. That is right, that is the answer.

(Testimony of Cyril Gregory Gips.)

Q. And that is a quotation of the New Zealand—rather, of the Isaacson Iron Works?

A. That is correct.

Q. As per the named specifications of the New Zealand Government? A. Yes.

Mr. Gantt: Objection. The exhibit speaks for itself, your Honor.

Mr. Morrow: I am just identifying it.

Q. (By Mr. Morrow): And did you subsequently receive the formal proposal of the Isaacson Iron Works? I show you Plaintiff's [85] Exhibit 6. A. No. [86]

* * *

Q. (Continuing): Referring to Plaintiff's Exhibit 5, following receipt of that information what did you do in connection with the prospective New Zealand order?

A. I computed a price on the basis of the offer as quoted from Isaacson and submitted same to our Washington office for submission to the New Zealand Trade Commissioner.

Q. And referring to Plaintiff's Exhibit 8, is that the letter that you referred to your Washington office? A. That is correct.

Mr. Morrow: This is exhibit 8, your Honor.

Q. (By Mr. Morrow): Now, Mr. Gips, the letter to your Washington office, I believe, is dated May 8, 1952. Now, I hand you what are a series of wires, teletypes, Plaintiff's Exhibit 66, all of which are dated May 9, 1952. Now, with reference to those ex-

(Testimony of Cyril Gregory Gips.)

hibits which are admitted in evidence, can you tell what you did in connection with this New Zealand inquiry of May 9, 1952?

A. Yes. I received a wire from our Grace [87] Washington office requesting us to confirm grades of the material offered. That was early in the morning, 8:58, and as a result of that wire I sent a wire to our Seattle office requesting the same confirmation of grades. That was at 9:35. At 10:20 I received a reply from our Seattle office that those grades were in accordance with request and they also advised that the Isaacson Iron Works now stated to get an allocation for 430 pounds of carbon steel. Then as a result of that answer I wired back to our Washington office the reply to their earlier wire in which I confirmed the grades and stated that requirement for allocation of carbon steel. Then again at 1:00 o'clock—1:06—I received a wire from our Washington office——

The Court (Interposing): Are you just reading these wires?

Mr. Morrow: No, he is just telling what he did, your Honor.

Let me have that wire and I would like to read it to the Court.

Q. (By Mr. Morrow): This is the wire that you received from your Washington office?

A. Yes, sir. [88]

Q. "May 9, 1:05 p.m. Steel for New Zealand. Expect to have order from embassy on Monday. Please advise shipping weight each grade today."

(Testimony of Cyril Gregory Gips.)

By the way, there are two wires, one pink and one yellow. What is the significance of that?

A. Well, in every office the pink would indicate an incoming wire and the yellow an outgoing wire. However, I did notice there are wires from two offices in there.

Q. Now, handing you Plaintiff's Exhibit 9, the exhibit indicates that there was a letter written May 8, 1952, by Mr. Schlaugh to the San Francisco office, and with a receipt stamp of May 9, 1952. Can you tell us, Mr. Gips, if that letter was received from your Seattle office and came to your attention on May 9, 1952?

A. Yes, it did.

Q. Was that the first information you had concerning the quotation of billets by the Seattle Foundry?

A. Yes, it was.

Q. Now, in respect to the other wires contained in Exhibit 66, will you tell us what you did in connection with the Seattle Foundry and the [89] Isaacson offers so far as your wires are concerned?

A. When receiving—after having received the wire from our Washington office advising that they would give us the order on Monday they requested shipping weight and I wired the Grace Seattle to request them to immediately advise the shipping weight of each grade and also requested them to advise if Seattle Foundry could confirm the grades as was specified earlier in the morning and what allocation they required. In answer to that—

Q. (Interposing): First of all, why did you request that information?

A. Well, because it was a second offer I re-

(Testimony of Cyril Gregory Gips.)

ceived from the same business and in such a case it was—you would have to determine if they also confirmed the same grades as was required as the first supplier did. In other words, to have an identical same offer.

Q. Had your Washington office requested any confirmation along that line previously?

A. Well, they had in the first wire I—rather, our Washington office had requested us to confirm the grades of the steel and inasmuch as since then we had received the second offer on the same material we wanted to make sure that the [90] second offer was identical to the first offer to be able to consider them both under the same light.

Q. And did you receive any reply from your Seattle office?

A. Yes. They replied to us at 4:09 p.m. in the afternoon that——

Q. (Interposing): That is fine.

Mr. Morrow: I would like to read this, may it please the Court.

Q. (By Mr. Morrow, Continuing): “6.” That refers to the number of the teletype, does it?

A. Yes.

Q. “Your 94”; that would be San Francisco—94? A. Yes.

Q. “Isaacson quotation, item one, 530 pounds, item two, 620 pounds. Re Seattle Foundry will rep.”

What does that mean?

A. That is “will reply.” That was a mistake in

(Testimony of Cyril Gregory Gips.)

the machine apparently. It dropped a couple of lines.

Q. Very well. Now, at that time did you notice—did you observe—the difference in the Isaacson quotation? When I refer to the Isaacson quotation I refer to the information that Mr. Gips [91] had and the price as quoted by Seattle Foundry.

A. Yes. I had compared one against the other and found that the Seattle Foundry's prices were substantially lower than those of Isaacson Iron Works.

Q. Do you recall what you did in connection with that matter?

A. Well, I immediately tried to recheck everything and consequently wired our Seattle office, or wrote them, inquiring—

Q. (Interposing): I refer you to Plaintiff's Exhibit 27. Does that refresh your recollection as to what you did?

A. Yes. That is the letter that I wrote.

Q. You needn't read it but I would like to read it to the Court. [92]

* * *

The Court: That is signed by—

Q. (By Mr. Morrow, Continuing): Is that signed by you, Mr. Gips? A. Yes.

Q. And to whom did you direct that letter?

A. To Mr. Schlaugh of the Seattle office.

Q. And who is Mr. Schlaugh?

A. He, so to speak, is my counterpart in the

(Testimony of Cyril Gregory Gips.)

Seattle office. He was the trader there who handled the merchandising in the Grace Seattle office.

Q. This letter that we have just talked about, Plaintiff's Exhibit 10, dated May 9th, do you recall what day of the week, or have you checked the day of the week, May 9, 1952, was?

A. Yes. I have checked it. It was a Friday.

Q. Friday? A. Yes.

Q. Was there anything else to your recollection that you did on Friday, May 9th, in [93] connection with this prospective New Zealand order?

A. No, I don't believe so.

Q. Now, did you subsequently receive the——

The Court: I am going to interrupt a moment.

Mr. Morrow: Yes.

The Court: So that the record is clear, I think when you inquired and showed the letter to Mr. Gips you referred to Exhibit 27. Apparently that is the same as Exhibit 10. When you said Exhibit 27 I think you were using another list. Just so that we get the record straight.

Mr. Morrow: Did I say 10 or 27?

The Court: You said 27 when you refreshed his recollection.

Mr. Morrow: Yes.

Mr. Gantt: That is correct, your Honor.

Mr. Morrow: That is a previous——

The Court (Interposing): Number?

Mr. Morrow: Yes, and the record will so show.

Q. (By Mr. Morrow, Continuing): Now, did you receive a purchase order from the New Zealand

(Testimony of Cyril Gregory Gips.)

Government Trade [94] Commission in your office in San Francisco? A. I did.

Q. Referring you to Plaintiff's Exhibit 11, I will ask you if that is the purchase order?

A. It is.

Mr. Morrow: I would like to show this to the Court and point out the specifications, particularly the ASTM A-17/29 specifications, and the billets, 750 in connection with one size and 50 in connection with the other size.

Q. (By Mr. Morrow): Now, Mr. Gips, referring you to Plaintiff's Exhibit 12, which is a teletype in evidence, dated May 12th at 12:02 p.m., did this teletype come to your attention?

A. That was a teletype that I sent.

Q. That was a teletype you sent?

A. That was a teletype I sent.

Q. And where did that go?

A. That went to our Seattle office.

Q. And what does this "2" refer to?

A. May I see it again? Excuse me. That is a regular company communication where the message has a separate number form.

Q. Is that your office number? [95]

A. That is from our office. It is numbered message number two from our office.

Q. Now, "Our 9586," what does that refer to?

A. That refers to the letter I had sent on Friday night which you exhibited just a short while back. That is the number of the letter.

(Testimony of Cyril Gregory Gips.)

Q. Exhibit 10? Is this Exhibit 10 the letter "9586"?

A. Yes. It says that here on the top.

Q. I see. In other words, the reference here "2" is your teletype number and you refer to your previous letter "9586," which is Plaintiff's Exhibit 10; is that correct?

A. That is correct.

Mr. Morrow: I would like to read this teletype. It is dated May 12th, 12:02 p.m., which would be on a Monday.

"2. Our 9586. Please reply explaining substantial difference in price."

Q. (By Mr. Morrow): Did you receive an answer to that teletype, Mr. Gips?

A. I did.

Q. And referring you to Plaintiff's Exhibit 13, is that the reply from your Seattle office? [96]

A. That is.

Q. Did that come to your attention?

A. It did.

Mr. Morrow: I would like to read this in evidence. May 12th, 12:02 p.m., the same time as the teletype from Seattle—to Seattle which I just read. The two teletypes apparently sent at the same time.

"8. Your 94 and 9586."

This is a reply from Seattle to San Francisco.

"Seattle Foundry confirms item one, grade two, item two, grade one, quotation for our 3234 in order. Seattle Foundry now advise nickel steel not required these specifications. Therefore, do not need any allocation. Presume you have New Zealand space from Seattle."

(Testimony of Cyril Gregory Gips.)

Q. (By Mr. Morrow): Mr. Gips, what does the "8" refer to in this—"8, your 94"?

A. Does the message start off with the number eight?

Q. Yes.

A. Then it means that the message number is number eight. [97]

Q. And "Your 94 and 9586"?

A. 9586, that was the letter which was written Friday afternoon which you had in evidence just now and which is numbered by that number and the message 94 must be a message of the previous Friday. I would have to go through the files to identify it.

Q. Ninety-four is one of the messages contained in Plaintiff's Exhibit Number 66, is it?

A. May I see it?

Q. Yes. A. Yes, that is correct.

Q. And 9586 has reference to the letter of May 9th, your letter to the Seattle office of May 9th?

A. That is right.

Q. Now, what information did the—we shouldn't say information but what was your understanding as to whether or not the Seattle Foundry office was correct with reference to the message you received from——

Mr. Gantt: Objection, your Honor, as to understanding.

Q. (By Mr. Morrow, Continuing): Seattle May 12th?

The Witness: Excuse me. [98]

(Testimony of Cyril Gregory Gips.)

Mr. Morrow: I don't know whether the words "in order" require explanation.

The Court: You are refering now to Exhibit 13?

The Witness: Yes, sir.

Mr. Morrow: Yes.

The Court: What is it you are asking?

Mr. Morrow: The message reads, in reply to the letter, to check the specifications, and in reply to two teletypes, one to check—one to his wire, which had just gone out, I guess it was, and also a previous wire in connection with grades, and then part of the Exhibit 13 says:

"Quotations per our 3234 in order."

My question to Mr. Gips is: What did he understand by those words. I think that it is a telegram or wire which needs some explanation and to show the state of mind on Mr. Gips' part.

Mr. Gantt: The objection is to a conclusion, your Honor.

The Court: I will overrule the objection. Do you understand the question?

The Witness: Yes, sir.

A. The "in order" there stands for that they confirm the price, specifications, and other [99] items which I had requested checked in my letters and wire; that they were found to be correct—in order—correct.

The Court: You stated you understood that?

The Witness: That is what I understood.

Mr. Gantt: I object to the answer and move that it be stricken.

(Testimony of Cyril Gregory Gips.)

The Court: Objection overruled. The motion is denied.

Q. (By Mr. Morrow): Now, on May 13th, Mr. Gips, there is a wire here, Plaintiff's Exhibit 15.

Mr. Morrow: May the Court please, on these wires, the only part relevant to the case is the wire which refers to steel billets in each instance. There are other messages which have nothing to do with this case. For example, here there is steel billets, and there is oats down here, and butter and lumber and in all the wires the identification of the wire is the steel billets.

Q. (By Mr. Morrow, continuing): Referring you to Plaintiff's Exhibit 15 now, can you state whether you sent such a wire as that and did you get such a reply as appears [100] in Plaintiff's Exhibit 16?

A. I did send this message.

The Court: Number 15?

The Witness: On the 13th, your Honor. Yes, it is Exhibit 15.

Mr. Gantt: If the Court please, it is a little difficult to hear. If Mr. Gips could talk a little louder——

The Witness (Interposing): Excuse me.

Mr. Gantt (Continuing): and also when you are dealing with the teletypes with three or four things on them, will you report where on the page is the wire you sent?

Mr. Morrow: I think it would be much simpler

(Testimony of Cyril Gregory Gips.)

and faster if Mr. Gips could just read the wire, if you would have no objection.

Mr. Gantt: With regard to these wires where there are more than one of them on the page, that is satisfactory. Regarding 15 and 16, that is satisfactory.

Mr. Morrow: All right.

Q. (By Mr. Morrow): Will you read the message you sent, referring to Exhibit 15, Mr. Gips?

A. Steel billets, sent May 13, 1952. [101]

Q. By the way, what day of the week was that?

A. Tuesday.

Q. Tuesday?

The Court: What was the date again?

The Witness: Tuesday.

The Court: The date?

The Witness: The 13th.

A. It is message number four. It states:

“Confirm Seattle Foundry and Isaacson Iron Works. Extend validity offers. Ref your letters 3234 and 3208 this reply to your 16 5:00 p.m. Probably will place order soonest.”

The Court: Probably will place order what?

The Witness: Soonest.

Q. (By Mr. Morrow): What message—this is sort of a shorthand way of saying things, Mr. Gips?

A. That is correct.

Q. Will you interpret that wire for us, please?

A. I hereby requested our Seattle office to confirm to us that the Seattle Foundry and Isaacson Iron Works would extend their bids, firm to us [102]

(Testimony of Cyril Gregory Gips.)

or to our Seattle office, and reply by the 16th of May, 5:00 p.m., which would be the end of the working day, and we put them on notice that we expected to place the order as soon as possible. "Soonest" is a wiring word which means as soon as possible.

Q. Now, by the way, what hour was that wire?

A. That is at 11:40 a.m.

Q. 11:40 a.m.; and now your reply, referring you to Plaintiff's Exhibit 16. It is the reply you received from your Seattle office. First, what was the hour?

A. The message was received at 2:25 p.m.

Q. And the date?

A. And the date was the 13th of May, 1952, steel billets, number 18.

"Your 4. Both suppliers extend offers per our 3208 and 3234. Reply May 16."

The Court: That is a reply from Seattle?

The Witness: That is the reply from Seattle, your Honor.

Q. (By Mr. Morrow): Now, following receipt of the wire from Seattle and during this period May 9th to May 13th, [103] what considerations did you give to placing the order with either Isaacson or Foundry?

A. The offer of Isaacson came in first and the Seattle Foundry offer came in second. It was the identical same offer except for price. The Seattle Foundry price was substantially lower, and had in the meantime been rechecked. Also terms and conditions. The further consideration was with whom to place the business, in other words, the supplier. The

(Testimony of Cyril Gregory Gips.)

consideration was that the Isaacson Iron Works were rather well known and a reputable firm and the Seattle Foundry Company was comparatively unknown, at least to us, and we had not heard of them previously. So, we considered that in case of choosing between the two we would prefer to hand it to the lowest bidder but on the other hand we did want to assure ourselves of the reputation, or to be sure that we were getting the right materials from an unknown supplier.

Q. What did you do in that connection so far as Seattle Foundry was concerned?

A. Well, we came to the consideration that we had to assure ourselves that they would supply the correct material in accordance with the purchase made from us. [104]

Mr. Gantt: Objection, your Honor. I think the question was what he did. He is just saying what he thought. May the question and answer be read back?

The Court: The Reporter will read the question and answer.

(Whereupon, the following was read by the Reporter:)

“Q. What did you do in that connection so far as Seattle Foundry was concerned?

“A. Well, we came to the consideration that we had to assure ourselves that they would supply the correct material in accordance with the purchase made from us.”

(Testimony of Cyril Gregory Gips.)

The Court: I think the answer might be stricken; then answer the question as put.

Mr. Gantt: Yes.

Mr. Morrow: I, perhaps, might rephrase the question.

Q. (By Mr. Morrow): Did you make any inquiry, Mr. Gips, about the possibilities of obtaining an inspection firm to inspect the material?

A. Yes, I did.

Q. Did you consider it necessary to make [105] and inspection if the material were bought by the Seattle Foundry Company? Bought from—yes, if the material were to be bought from the Seattle Foundry?

Mr. Morrow: Strike that.

The Court: Let me get that last answer that he gave there. You asked if he made inquiries? What was that question?

(Whereupon, the following was read by the Reporter:)

“Q. Did you make any inquiry, Mr. Gips, about the possibilities of obtaining an inspection firm to inspect the material?

“A. Yes, I did.”

Mr. Morrow: I got ahead of myself.

Q. (By Mr. Morrow, continuing): From whom did you make inquiry, Mr. Gips?

A. From Mr. Gleason of the Kaiser Steel Corporation.

(Testimony of Cyril Gregory Gips.)

Q. And what information did you get from him? A. He——

Mr. Gantt (Interposing): Objection, your Honor. The answer would be hearsay. [106]

Mr. Morrow: I don't think it is hearsay.

The Court: I believe it is hearsay, all right.

Mr. Gantt: He is asked to tell what he heard from Mr. Gleason, who is not a party to the case.

Q. (By Mr. Morrow): Did Mr. Gleason make any recommendation to you, Mr. Gips, concerning any of the laboratories that are available to make an inspection of material that might be purchased in Seattle? A. Yes.

Q. Did he suggest any name to you?

A. He did suggest a name.

Q. What name did he suggest?

A. Pittsburgh Testing Laboratory.

Q. Now, following that, what did you do in connection with the matter of inspection?

A. I 'phoned Pittsburgh Testing Laboratory in San Francisco and—excuse me, does this conclude the question, or the answer, I should say?

Q. Who did you talk to there?

A. To Mr. Clark.

Q. And what was the—what did you talk [107] about? What did—what inquiries did you make, for example? A. I stated to him that——

Mr. Gantt: If your Honor please, objection. This conversation is not related to a time. It has no relation to when it was being made.

The Court: Can you fix that?

(Testimony of Cyril Gregory Gips.)

Mr. Morrow: Yes.

Q. (By Mr. Morrow): Approximately when did you contact Mr. Gleason first of the Kaiser Steel?

A. Immediately after the prices of both firms had been rechecked and I had come to the conclusion that there might be a possibility of placing the business with Seattle Foundry.

Q. Can you fix that date by referring to any of your messages?

A. I think I could. I mean, I can indicate in which period.

Q. Referring you to Plaintiff's Exhibit 16, can you fix your—the date of your—conversation with Mr. Clark with reference to that exhibit? What is the time of that exhibit?

A. 2:25 p.m.

Q. Of what day? [108]

A. On the 13th of May.

Q. Now, did this conversation with Mr. Clark occur prior to that time or subsequent to that time?

A. It took place after the verification of prices had taken place.

Q. Did I hand you the right wire?

A. I think that those——

Q. (Interposing): This is the wrong wire. Here. Well, there are two wires here, the one extending the offer, 2:25 p.m., and the other one in reference to the matter being in order. Now, can you tell us with reference to any of those documents and the time therein as to when you had this conversation with Mr. Clark?

(Testimony of Cyril Gregory Gips.)

A. Well, the confirmation of conditions was at 12:02, on May 12th, which, if I am not mistaken, was a Monday. It would have taken place between that moment and the moment I placed the order with the Seattle Foundry.

Mr. Gantt: Objection, your Honor. What is the moment that he placed the order with Seattle Foundry?

Mr. Morrow: We are just getting to that. [109]

The Witness: I think you can find that in the records.

Q. (By Mr. Morrow): Referring you to Plaintiff's Exhibit 15, what is that? Would you give the time and the hour and read what that wire is?

The Court: This is what. Plaintiff's Exhibit what?

Mr. Morrow: Plaintiff's Exhibit 15, your Honor.

The Witness: Plaintiff's Exhibit 15, yes.

A. It is a message which I sent, which Grace, San Francisco, sent to Grace, Seattle, and reads as follows:

"Steel billets. 5/13/52. 11:40 a.m.

"4. Confirm Seattle Foundry and Isaacson Iron Works. Extend validity offers. Ref your letters 3204 and 3208. This reply to your 16 5:00 p.m. Probably will place order soonest."

This is the message I sent requesting an extension of—

Q. (By Mr. Morrow, interposing): Yes; now, can you tell us, in reference to these messages, when

(Testimony of Cyril Gregory Gips.)

you talked to [110] Mr. Clark or any particular day or period?

A. Yes. After twelve o'clock noon, Monday, but before the placing of the order with our Seattle office for placing with the Foundry.

Q. When you say "* * * placing * * * the order * * *" with Seattle Foundry, are you referring to——

A. (Interposing): This is not—excuse me. I am referring to when I wired our Seattle office placing the business or accepting the Seattle Foundry offer from them and advising them of such, and I did——

Q. (Interposing): Is this the matter you have reference to, Exhibit 17?

A. Yes. This is the message that I am referring to. In other words, I place the conversation between noon, Monday, and May 15th, 11:49 a.m.

Q. And May 15th, 11:49 a.m.? A. Yes.

Mr. Morrow: I would like to read this wire at this time, your Honor. "1952, May 15, a.m. 11:49, steel billets 18 your 18 confirm Seattle Foundry accepting order as per your letter 3234 and TT8 we certify license A2-416-19731 expiration Oct. 31st and W2-3QU 52 rating. Inspection will be made by Pittsburgh Testing Lab." [111]

Q. (By Mr. Morrow): Now, as I understand now, Mr. Gips, you say that this conversation that you are referring to with Mr. Clark took place prior to May 15th at 11:49, the time of sending the Exhibit 17? A. That is correct.

(Testimony of Cyril Gregory Gips.)

Q. And it occurred after Monday, May 12th?

A. That is correct.

* * *

Q. Following your wire of the 17th to your Seattle office, did you receive any confirmation of that, Mr. Gips, referring you to Plaintiff's Exhibit 18?

A. Excuse me; could you repeat the question, Mr. Morrow?

Q. Well, you sent this wire, Plaintiff's Exhibit 17, in which you requested confirmation of [112] the Seattle Foundry accepting the order. Did you receive—and you advised that an inspection would be made by Pittsburgh Testing Laboratory—did you receive a reply back from your Seattle office?

A. I did.

Q. Is that Plaintiff's Exhibit 18?

A. That is correct.

Q. Now, would you just read that, giving us the date and the hour?

A. Steel billets message was sent 1952, May 15th, 3:08 p.m.:

“31. Your 18. We confirm. Will advise tomorrow if Seattle Foundry requires any allocation.”

The Court: What was the date of that?

The Witness: The 15th, your Honor.

Mr. Morrow: May 15th.

Q. (By Mr. Morrow): The time?

A. 3:08.

Q. 3:08 p.m. Could you tell us whether you considered that wire to be a confirmation of the acceptance of Seattle Foundry?

(Testimony of Cyril Gregory Gips.)

A. That is correct.

Q. And who was that wire received from? [113]

A. We received that from our Seattle office.

Q. Who specifically in Seattle, if you know?

A. Mr. Schlaugh. I cannot be definite about that, Mr. Morrow.

Q. Now, referring you to Plaintiff's Exhibit 19, did you write that letter? A. I did.

Q. And is that your signature?

A. That is correct.

Q. And did you notice the enclosure there—the enclosure? I think there is an original and a copy.

A. That is correct. An original and a copy of a purchase order.

Q. And you sent that letter to your Seattle office, did you? A. That is correct.

Mr. Morrow: At this time, your Honor, I would like to read this letter:

“May 15, 1952.”

This is Plaintiff's Exhibit 19, with a receipt, Seattle receipt, stamp on of May 16, 1952. [114]

* * *

Attached to that is the enclosure which is the so-called purchase order form of the Grace Company and in this case we have——

The Court (Interposing): It is part of the one exhibit?

Mr. Morrow: It is part of the one exhibit; but in this case we have sometimes put in copies. That is, one copy would be from a Seattle office and one

(Testimony of Cyril Gregory Gips.)

from a San Francisco office. In this case the original exhibit consisted of this top purchase order.

Now, I would also like to have the Court read—rather, to take a look at—the purchase order and particularly the matters in reference to the specifications required at that time.

(Whereupon, there was a brief pause.)

Q. (By Mr. Morrow): Mr. Gips, in connection with your dealings with Pittsburgh Testing Laboratory, did you write a letter, referring you to Plaintiff's Exhibit 21? A. I did.

Q. And is that your signature?

A. That is correct.

Q. And did you receive a reply from [116] Pittsburgh? A. I did.

Q. And referring you to Plaintiff's Exhibit 22, is that the reply that you received?

A. That is correct. [117]

* * *

Q. Mr. Gips, you have stated that you called the Pittsburgh Testing Laboratory and talked to [136] Mr. Clark some time between the 12th and noon of the 15th.

Mr. Gantt: If the Court please, I think the record shows that that was between the 13th—

Mr. Morrow (Interposing): I may stand corrected on that.

The Court: Well, we can ask the witness if he wishes to restate that.

(Testimony of Cyril Gregory Gips.)

Mr. Morrow: I think we should refer to Exhibit 16.

The Court: Exhibit 16 is a wire reply received 12:25 p.m., May 13, 1952.

Mr. Morrow: And perhaps Exhibit 15, and the further wires on the 15th, Exhibit 16, I believe—or, 17, is it—I have 16—17.

Q. (By Mr. Morrow, continuing): Referring to Exhibits 15, 16 and 17, Mr. Gips, can you tell us when you called the Pittsburgh Testing Laboratory? Can you fix the approximate date or dates?

A. I believe I did so yesterday and I would like to reiterate that today—that I think the time is placed between Monday, the 12th, and Thursday, the 15th, at which time the order was placed; and, I [137] think, this matter came up yesterday but I am quite positive that it was after I had received a wire communication from our Seattle office stating that the Seattle Foundry could also confirm the grades as we had requested them to advise us on the previous Friday. That would determine the period. The starting period would be on the 12th rather than the 13th of May.

Q. How do you fix the 15th as——

A. (Interposing): On the 15th I placed the order or accepted the bid of the Seattle Foundry and previous to that I had concluded the verbal understanding——

Mr. Gantt (Interposing): Objection, your Honor. I would like to get it clear whether the witness is doing this from his own recollection or ref-

(Testimony of Cyril Gregory Gips.)

erence to an exhibit and, if so, what is the particular exhibit?

The Court: Mr. Gantt, if you will, hold your objections until the witness is through. You are very rude.

Mr. Gantt: I apologize, your Honor.

The Court: The Reporter will read the answer.

(Whereupon, the following was read by [138] the Reporter:

("A. On the 15th I placed the order or accepted the bid of the Seattle Foundry and previous to that I had concluded the verbal understanding"—)

A. (Continuing): —the verbal understanding with the Pittsburgh Testing Laboratory to conduct an inspection and certify the quality of the product which was to be produced by the Seattle Foundry Company. After that verbal agreement I placed the order with, or accepted the bid of, Seattle Foundry Company; and I believe—

Q. (By Mr. Morrow): And did you refer to a particular wire? A. That is correct; yes.

Q. Which wire is that? Which exhibit is that before you? Would you just read the time and the date there on the wire first?

A. That is a wire from Grace, San Francisco.

Q. Is that Exhibit 17?

A. Exhibit 17, of May 15, 1952, 11:49 a.m.:

"Steel billets. 18 your 18. Confirm Seattle Foundry accepting order as per your letter 3234 and TT

(Testimony of Cyril Gregory Gips.)

8 we certify license A2-416-10731 expiration October 31st and W2-3QU 52 rating. Inspection will be made by Pittsburgh Testing Laboratories.” [139]

The Court: You have read that?

The Witness: I have read the contents of the wire, your Honor.

The Court: Of Exhibit 17?

The Witness: Of Exhibit 17.

Q. (By Mr. Morrow): Now, will you please refer to Plaintiff's Exhibit 19 and state whether your telephone talk to Pittsburgh was prior to writing this letter, Exhibit 19? A. Yes, it was.

Q. Is that your signature on Plaintiff's Exhibit 19? A. That is correct.

Q. Very well; now, what was the subject of your call to Pittsburgh Testing Laboratory—Mr. Clark? You said you talked to Mr. Clark—called Pittsburgh and talked to Mr. Clark. What was the subject of that conversation?

The Court: Before we proceed, do you want to fix any more time on that?

Mr. Gantt: No, your Honor, and I apologize for interrupting as I did.

The Court: I know you didn't intend [140] that. I might suggest this on objections here. If you will, let a witness complete his answer or Counsel complete his question before you object. Now, it is a little different, I feel, when you are trying a case before the Court than before a jury where you have to interrupt because something may be going in, something that may have to be stopped; and

(Testimony of Cyril Gregory Gips.)

there may be occasions here, but, if you don't have to do it to protect your record, I ask you to wait until a question or answer is completed and then you may move to strike; and, of course, circumstances are to be brought out and cross-examination covers that.

With that preliminary, you may go ahead.

The Reporter will read the question.

(Whereupon, the following was read by the Reporter: "Q. Very well; now, what was the subject of your call to Pittsburgh Testing Laboratory—Mr. Clark? You said you talked to Mr. Clark—called Pittsburgh and talked to Mr. Clark. What was the subject of that conversation?"')

A. Mr. Morrow, are you referring to the first conversation, or the conversation whereby we closed the verbal agreement? [141]

Q. (By Mr. Morrow): Yes. Well, I am talking about the first conversation.

A. The first contract I had with Pittsburgh Testing Laboratory was by 'phone and I talked to Mr. Clark and I informed him that we had obtained steel billets and that his company had been recommended to me to make inspection for quality of the product to be delivered and that we had intention of—we were considering placing this order with Seattle Foundry Company in Seattle.

(Testimony of Cyril Gregory Gips.)

Q. Mr. Gips, may I ask: Did you tell him who you were and who you represented?

A. That is correct. I introduced myself and inquired if Mr. Clark represented Pittsburgh Testing Laboratory and explained the situation to him: That we had this order and that we were considering placing it with Seattle Foundry Company and that we felt that we wanted to have an independent inspection service guarantee us the quality of the product since the Seattle Foundry Company was practically unknown to us and we felt that we could only place the business with them if we had that additional protection and I asked him if [142] Pittsburgh Testing Laboratory did such work and he said, yes, that is what they were for, and then later on he brought me——

Q. (Interposing): Now, was there any discussion about the price that they would charge for their services?

A. I asked him in case they would be able to do so what would their price for inspection be and Mr. Clark quoted me prices and that finalized the situation as far as that was concerned. I told him we would call him back later if we would go through with it.

Q. In this first conversation do you recall whether or not you gave him any specifications?

A. Yes. I read him the letter of inquiry which we had received from our Wasington office. I believe that would refer to Exhibit Number 1 if I have the right thing in mind.

(Testimony of Cyril Gregory Gips.)

Q. Yes. Yes, well now, after you had this talk with Mr. Clark what did you do in connection with the—with this matter?

A. Well, I took the rates which Mr. Clark had given me and tried to make a calculation of how much this inspection would cost us and added that to the cost of the Seattle Foundry offer in order to [143] see if the expense, the additional expense, of having an inspection would not burden the cost so much that it would be higher than the cost of the first bid we had accepted—we had received from Isaacson Iron Works.

Q. In this first talk you had with Mr. Clark, do you recall whether or not you asked him to make an estimate or give you a firm price upon the whole job?

A. Well, I asked him. The rates are based upon an hourly basis work and the amount of work done and I asked him if he wasn't able to give us a flat price per ton or for the whole work and he said that that was not usual, that it was usual for an inspection to be conducted and they could not perceive how long such an inspection would take, depending on the facilities, and that, therefore, they were unable to give us a flat rate so that it was left standing there—that they would charge us on an hourly basis and any expenses that they would incur, I do remember him telling me, in this inspection that they would be able to inspect in Seattle through their own facilities there but that the analysis of any material would have to be

(Testimony of Cyril Gregory Gips.)

checked in the laboratory in San Francisco, [144] they could not do that in Seattle, and I remember him asking me if that was satisfactory and agreed to that, that it would be satisfactory.

Q. Well now, after this conversation with him you stated that you made a computation and estimate. What was your estimate as to the cost of the inspection to be performed by Pittsburgh?

A. Well, it was—I remember the total figure being between four and six hundred dollars for the whole job. However, I made that on the basis of what I personally thought it could amount to; but, I figured about between four and six hundred dollars.

Q. Now, did you have any further talk with Mr. Clark prior to your wire to Seattle at about noon on May 15, 1952?

A. Yes. Well, that was the conversation I referred to before when——

Q. (Interposing): Just a minute. I want to fix the time and can you fix the time of it in reference to Plaintiff's Exhibit 11?

The Court: Which conversation are you speaking of now?

Mr. Morrow: This is the second [145] conversation.

Q. (By Mr. Morrow, Continuing): In other words, can you fix the time by referring to Plaintiff's Exhibit 11?

A. Yes, I can. I had actually been waiting to place the business with the Foundry or with either

(Testimony of Cyril Gregory Gips.)

one of the two bidders actually until such time that I had had a chance to look over the New Zealand Government's purchase order to check it with our figures, that everything was in order and all conditions were there, and I received that purchase order on May 15th and after I had checked it through I then had to proceed to place the order with any of the two bidders and inasmuch as we had decided to place the order with Seattle Foundry we automatically had to confirm the understanding and agreement and make a verbal agreement with Pittsburgh Testing Laboratory that if we did place the order that they would conduct the inspection and certification of the quality and that took place prior to my placing the order with the Seattle Foundry.

Q. Now, you say took place prior to your placing the order with Seattle Foundry. By your order you are referring, are you, to Plaintiff's [146] Exhibit 17? A. That is correct.

Q. Now, did the—in reference to Plaintiff's Exhibit 11, did the second conversation take place before or after you received your letter of transmittal and the New Zealand purchase order? That is Plaintiff's Exhibit 11, is it not?

A. I didn't quite catch the question.

Q. I am referring to Plaintiff's Exhibit 11 now.

A. Yes, sir.

Q. That is a letter of transmittal?

A. Yes, sir.

(Testimony of Cyril Gregory Gips.)

Q. Of a purchase order of the New Zealand Government Trade Commission, is it not?

A. That is correct.

Q. And your stamp shows that order was received on May 15th? A. That is correct.

Q. And, by the way, May 15th was what day of the week? A. Thursday.

Q. Have you checked that? A. Thursday.

Q. Thursday; now, the question is: Was your conversation or telephone call with Mr. Clark [147] before or after you received Plaintiff's Exhibit 11? The second call now I am talking about.

A. Well, It may have been the third call. There may have been various calls but the one you are referring to was placed after I had received and checked this letter and its attachments.

Q. Well now, the telephone conversation that you had after receiving Plaintiff's Exhibit 11 and before sending out Plaintiff's Exhibit 17, what was that; what was the subject of that call, the substance of that conversation?

A. That was to confirm to Mr. Clark the previous conversation we had. In the first place, I told him that we were placing the business with Seattle Foundry, accepting their bid, and that I was going to inform the supplier that Pittsburgh Testing Laboratory was going to conduct the inspection and certification of the material. I did that purposefully, that if there were any objections on the side of the supplier that we would hear from him immediately without having to wait or hear about it later, so

(Testimony of Cyril Gregory Gips.)

that I made that a part and condition of my contract with Seattle Foundry and I concluded and confirmed our verbal with Mr. Clark to accept his offer of the inspection and certification before [148] I placed the order with Seattle Foundry.

Q. Now, did you have any occasion to meet any of the officials of the Pittsburgh Testing Laboratory about this same time?

A. Mr. Robinson, the manager of the Pittsburgh Testing Laboratory, came to pay us a visit, to meet us face to face, and——

Q. (Interposing): Just a minute. When was that?

A. That was after the—after I had placed the business with Seattle Foundry and had concluded the verbal arrangement with Mr. Clark.

Q. Do you recall the day or the date?

A. Well, I am quite sure it was the following Friday. It was an extremely busy afternoon and I think I even made my excuse about being very busy that afternoon. He came to visit just to talk to us and I took him in to meet Mr. Mahoney, vice president in charge of the merchandise department.

Q. On that occasion what discussion did you have with Mr. Robinson?

A. Well, we told him about what we had done and I showed him the letter of inquiry from the—from our Wasington office, the first letter.

Q. Just a minute. May I have Plaintiff's [149] Exhibit 1? I will ask you, Mr. Gips, if Plaintiff's

(Testimony of Cyril Gregory Gips.)

Exhibit 1 is the inquiry from your Washington office that you referred to?

A. Yes. That is the inquiry letter from our Washington office.

Q. Just go on and tell us what the discussion was that took place between you and Mr. Robinson on that occasion?

A. Well, Mr. Robinson just confirmed that that is what they were for and that that is what they could do, and thanked us for working with them and having contacted them and that they would do a good job for us and look after the thing and that is about all the conversation that took place. I mean, we did not discuss at that time, or had never discussed with Mr. Robinson, any particular terms as to rates or anything else. It was just a general discussion.

Q. Did you confirm your understanding with Mr. Robinson——

Mr. Gantt (Interposing): Objected to. I beg your pardon. Objection, your Honor.

The Court: Form of the question?

Mr. Gantt: The form of the question is leading and calls for a conclusion. [150]

The Court: It appears to be.

Mr. Morrow: Yes.

Q. (By Mr. Morrow, Continuing): Referring you to Plaintiff's Exhibit 21, Mr. Gips, I will ask you what this exhibit has to do with reference to your conversations with Mr. Robinson or Mr. Clark and Mr. Robinson?

(Testimony of Cyril Gregory Gips.)

A. That is the letter I wrote to confirm in writing the understanding we had with Pittsburgh Testing Laboratory to conduct the inspection and certification of the material.

Q. I believe I asked you yesterday whether that was your signature?

A. That is correct. It is my signature.

Q. It is your signature. Now, on May—let's see now—referring you to Plaintiff's Exhibit 22, which is the reply to Exhibit 21, I will ask you in reference to the second paragraph of the exhibit whether the prices quoted there are what you understood to be the prices quoted by Mr. Clark to you?

A. Yes. That is correct. That was the verbal agreement we had of the rates he had quoted me Previously. [151]

* * *

Q. (By Mr. Morrow, Continuing): Mr. Gips, referring you to Plaintiff's Exhibit 4, will you advise us whether that document came to your attention and, if so, when?

The Court: May I inquire before you answer? That is exhibit what?

The Witness: 24.

Mr. Morrow: Did I misstate?

The Witness: You said 4; it is 24.

The Court: What is it, 24?

Mr. Morrow: Yes, number 24.

A. Will you restate the question?

Q. (By Mr. Morrow): Yes. The question is: In reference to Plaintiff's Exhibit 24, which you

(Testimony of Cyril Gregory Gips.)

have before you, did that document come to your attention? A. Yes, it did.

Q. And when? A. On May 20, 1952.

Q. Now, May 20, 1952, was what day of the week? It was a Tuesday, wasn't it? That is what I have anyway.

A. That would be Tuesday. Yes, it is [156] Tuesday.

Q. Tuesday? A. Yes, sir.

Q. Now, what did—what enclosure did you receive with that document?

A. The here attached enclosure, a letter from the—a copy of a letter of the Seattle Foundry Company addressed to our Grace Seattle office.

Q. And does it refer to any other enclosure?

A. Well, there was enclosed a duplicate signed copy of our purchase order number 8881, which was returned.

Q. All right. Now I want to get that exhibit.

A. That is attached to Exhibit Number 19.

Q. It is attached to——

A. (Interposing): The copy of the purchase order.

Q. Oh.

A. That is the one that was returned.

Q. I see; well, I guess we got this on the wrong letter of transmittal. One is a duplicate returned.

A. Or am I mistaken?

Mr. Morrow: I would like permission to take the duplicate and put it with the other letter.

Mr. Savage: I have no objection. [157]

(Testimony of Cyril Gregory Gips.)

The Court: You better take a look at those first. Do you want to take a look at those?

Mr. Gantt: Yes, your Honor, I would.

The Witness: I believe I could explain that the original and duplicate copy were originally attached to that letter and when it was received by our Seattle office the duplicate would have been taken off and signed and attached to their letter and returned to us, so that actually it should be attached to both letters because it was first sent out on that letter and returned on this letter.

Mr. Morrow: Yes, it can stay on that exhibit. Actually, it was sent with the original and a duplicate was sent with the original letter to Seattle and the duplicate was sent back to San Francisco.

The Court: We better not get confused either with the statement of the witness. The witness has been explaining that what was enclosed was 24. Is that what you have there?

Mr. Gantt: No, this is 19 that I have here, your Honor.

The Court: Your testimony then is just as to what was enclosed with Exhibit 24, which was a letter which came to your attention on May [158] 20, 1952.

Q. (By Mr. Morrow): I will refer you to this, to Exhibit 19, to which two documents are attached, export department number 8881, one being an original and the other being a copy, and ask you if the copy is the purchase order which was returned to you with Exhibit—yes—24? Yes?

(Testimony of Cyril Gregory Gips.)

A. Yes, that is the duplicate and signed returned copy of our purchase order which was attached to——

Mr. Morrow: (Interposing): I am going to ask permission to take the duplicate and put it with the returned letter of transmittal. Is there any objection to that?

Mr. Gantt: Well, the only point, your Honor, is that there is no indication in Exhibit 19, which Counsel has been referring to, that they sent the purchase order down in duplicate.

The Court: I think it should remain as it is. We have the testimony.

Mr. Morrow: All right. He testified it was. O.K.

Q. (By Mr. Morrow): Now, in reference to Exhibit 24 and the [159] enclosures, what did you do in connection with the matters therein discussed after you received the same in San Francisco on the 20th?

A. I called Mr. Clark of Pittsburgh Testing Laboratory.

Q. What day did you call him?

A. Well, I can not state the exact date but it would have been May 20th, the date of receipt of the letter, the inquiry.

Q. And what was the subject of that telephone conversation?

A. Well, I informed him and told him that our Seattle office had the confirmation from the supplier that they would manufacture the material;

(Testimony of Cyril Gregory Gips.)

however, that they had contacted—that Seattle Foundry had contacted—Pittsburgh Testing in Seattle and did not have a copy of the ASTM specification and they asked us to confirm that the specification conformed with the composition as listed in the attached letter. I read him the letter, or the copy of the letter, we had received of the Seattle Foundry Company.

Q. Is that the enclosure to Plaintiff's Exhibit 24 that you are talking about?

A. That is correct, yes. That was a copy of [160] a letter from Seattle Foundry Company, May 16th.

Q. Did you read him the whole letter?

A. Yes.

Q. What conversation took place between you at that time?

A. I do recall having talked—to having discussed the first paragraph and I believe that was about taper and son, and later on about the chemical content as laid down in this letter, and——

Q. (Interposing): Did Mr. Clark give you——

The Court (Interposing): Just let him finish.

The Witness: Excuse me.

A. (Continued): and told him—I read him the letter and told him—what was required and he told me at that time he didn't have the specification right in front of him because it was an old fashioned, outdated, specification but that he would look it up and give me the answer for reply to our Seattle office.

(Testimony of Cyril Gregory Gips.)

Q. (By Mr. Morrow): And did you have—and was there anything else said on that occasion?

A. No. He called me back for the answer but he just stated he couldn't give me the answer [161] right there and then.

The Court: We will take a recess now if that is satisfactory to you.

Mr. Morrow: All right.

The Court: Court will recess for ten minutes.

(Whereupon, at 11:08 o'clock, a.m., a recess was had in the within-entitled and numbered cause until 11:21 o'clock a.m., November 30, 1955, at which time, Counsel heretofore noted being present, the following proceedings were had, to wit:)

The Court: You may proceed, Mr. Morrow.

Q. (By Mr. Morrow): Mr. Gips, we were referring to a telephone conversation you had with Mr. Clark following receipt of a letter of May 20th, on May 20, from your Seattle office, Plaintiff's Exhibit 24, and I believe that you testified that Mr. Clark called you back.

Now, did Mr. Clark give you information in connection with your inquiry made on May 20, 1952, in reference to Plaintiff's Exhibit 24?

A. Yes.

Mr. Gantt: Object to the form of the [162] question, your Honor.

Mr. Morrow: That is preliminary.

(Testimony of Cyril Gregory Gips.)

Q. (By Mr. Morrow): Did he give you information?

The Court: You stand on the objection?

Mr. Gantt: I stand on the objection.

The Court: I didn't get the answer.

(Whereupon, the following was read by the Reporter: "A. Yes.")

Mr. Gantt: I object to the question being leading and ask that the answer be stricken.

The Court: He may answer that question yes or no. The question is: Did he? The objection is overruled. I didn't get the answer.

(Whereupon, the following was read by the Reporter: "A. Yes.")

Q. (By Mr. Morrow, Continuing): Will you refer please to Plaintiff's Exhibit 25?

A. I have that.

Q. All right; in reference to the information which Mr. Clark gave you and your conversation with him in connection with Plaintiff's Exhibit 24, what [163] did you do with that information?

A. Mr. Clark gave me the answers to the inquiry proposed in the letter which I had read him and I quoted those answers in my letter of May 22nd to Grace Seattle to be passed on to Seattle Foundry and that is marked as Exhibit 25.

Mr. Morrow: Plaintiff's Exhibit 25. At this time, your Honor, I would like to read Plaintiff's Exhibit 25. It is in evidence. It has been admitted.

(Testimony of Cyril Gregory Gips.)

The Court: Yes.

Q. (By Mr. Morrow): By the way, Mr. Gips, is this your signature on Plaintiff's Exhibit 25?

A. Yes, it is.

Mr. Morrow: "May 22, 1952; W. R. Grace and Co., Seattle Washington. Steel Billets for New Zealand purchase order 8881. Gentlemen."

"Your letter 3270."

Q. (By Mr. Morrow): For reference, 3270 is Plaintiff's Exhibit 24? Is that correct?

A. That is Correct. [164]

* * *

Q. What did Mr. Clark tell you in reference to a matter of specifications? You may refer to the exhibit which is in evidence, if that refreshes your recollection.

A. Yes. He told me that in answer to my question which was mailed in our Seattle office's letter that there was no copy of the specifications available in Seattle. He told me that he would supply their Seattle office with a copy of the specification and that he would ask him to keep the—inform the Seattle Foundry Company supplier as to what to do. He also gave me answers to the questions raised in the Seattle Foundry letter, which copy was attached to Exhibit 24, and I quoted those just the [166] way he told me over the 'phone and that is all I recall about that conversation.

Q. Yes; and I believe you said you related that to your Seattle office? A. Yes.

(Testimony of Cyril Gregory Gips.)

Q. Now, referring you to the enclosure attached to Plaintiff's Exhibit 24 and the pencil marks on that exhibit following the last paragraph, can you identify that writing?

A. Yes. That is my writing. Those were some of the notes I took down.

Q. Would you just read that, please, your notes that you took down?

A. "The depth of tapering must not exceed $1/16$ or $1/8$ inch of dimension up to a maximum of $3/4$ of one inch."

Q. When did you take down that note?

A. That I took down during the conversation with Mr. Clark.

Q. Was that the information he gave you?

A. Yes. That is literally what he told me or dictated to me.

Mr. Morrow: Plaintiff's Exhibit 27?

(Whereupon, document was handed to Counsel by the Clerk.) [167]

Mr. Morrow: I would like to read this in evidence, your Honor. It has been admitted.

The Court: It has been admitted?

Mr. Morrow: Yes. [168]

* * *

Q. (By Mr. Morrow): Mr. Gips, did Plaintiff's Exhibit 27, which I hand you, come to your attention in the San Francisco office?

A. Yes, it did.

(Testimony of Cyril Gregory Gips.)

Q. And what, if anything, did you do in connection with that?

A. I called again the Pittsburgh Testing Laboratory and read them the contents in the letter and asked them to—or to talk to Mr. Clark and asked Mr. Clark to verify and tell me what the answer to that was, what the clarification was.

Mr. Morrow: Plaintiff's Exhibit 28 has been admitted in evidence, your Honor, letter 9647. I would like to read it with permission of the Court.

The Court: All right. [169]

* * *

Q. (By Mr. Morrow): I ask you, Mr. Gips, did this letter, Exhibit 28, come to your attention?

A. Yes; it was written by me.

Q. And when was it written by you in reference to the last previously mentioned call to Mr. Clark?

A. This was the answer I received.

Mr. Morrow: Strike that and let me rephrase my question.

Q. (By Mr. Morrow): In reference to this letter, that is exhibit 28; is that correct?

A. That is correct.

Q. Where did you get the information in that letter which you sent to Seattle?

A. I received that from Mr. Clark over the 'phone.

Q. About when?

A. Directly in answer to my inquiry when I read

(Testimony of Cyril Gregory Gips.)

him the contents of the letter I had received from Seattle, which is Exhibit 27. [170]

* * *

Q. (By Mr. Morrow): Mr. Gips, referring you to Plaintiff's Exhibit 29, did that come to your attention? A. Yes, it did.

Q. And what did you do in connection with that?

A. Well, I called again Mr. Clark and told him that again the letter I had written—transcript of what he told me—was not understood and asked him what we could do to clarify this completely.

Q. And do you recall what he said?

A. Well, he mentioned he would refer this matter directly to his Seattle representative who would then clarify it with the Foundry.

Mr. Morrow: Now I would like to offer—this is Defendant's Exhibit 4, is it?

The Clerk: A-9.

Mr. Morrow: A-9, pardon me. Defendant's Exhibit A-9 in evidence. That is one of the exhibits listed as a Defendant's exhibit in the pretrial order.

Mr. Savage: Seattle Foundry has no objection.

The Court: Is there any objection?

Mr. Gantt: There is no objection to it, [172] your Honor. I don't think this witness can testify to anything about it.

Mr. Morrow: I don't intend to have him.

The Court: That comes in without objection, that exhibit, and you think it has some bearing to be let in now, do you, Mr. Morrow?

(Testimony of Cyril Gregory Gips.)

Mr. Morrow: Yes, your Honor. Mr. Gips just testified that Mr. Clark said he would get in touch with a Seattle representative and this has to do with that.

The Court: All right.

(Defendant's Exhibit A-9 admitted.)

Mr. Morrow: I would like permission to read this.

"Pittsburgh Testing Laboratory, inter-office correspondence, order number SF 5799, Subject W. R. Grace and Company, file number" blank, "prospect number" blank, "To Seattle office from San Francisco office, date June 4, 1952, Attention of Mr. M. E. Johnson.

"Following is copy of paragraph from A-17/29 covering this:

"Chipping: (a) Billets may be chipped to remove surface defects, provided that the depth of chipping does [173] not exceed $1/16$ in. for each inch of dimension concerned, up to a maximum depth of $3/4$ in., and provided that the width of the chipping is at least four times its greatest depth; except that in the case of slabs where the width is at least twice the thickness, the depth of chipping on the wide surfaces may not exceed $3/32$ in. for each inch of dimension concerned, up to a maximum depth of $3/4$ in. (b) In special cases, particularly large alloy-steel billets where it is necessary and is not injurious, greater depth of chipping may be permitted by agreement between the manufacturer

(Testimony of Cyril Gregory Gips.)

and the purchaser. W. W. Clark. Received June 5, 1952, Pittsburgh Tes. Lab. Seattle Office.”

Plaintiff's Exhibit 30?

(Whereupon, a document was handed to Counsel by the Clerk.)

It has been admitted in evidence, your Honor.

The Court: All right.

Mr. Morrow: I would like to read it.

“G.C.S.F., G.C.Se.”

Q. (By Mr. Morrow): I will ask you, Mr. Gips, what that refers to?

A. Could you repeat it, Mr. Morrow?

Q. “G.C.S.F.”

A. That is a message directed to the San [174] Francisco office from the Seattle office. That means to Grace Company San Francisco from Grace Company Seattle.

Mr. Morrow: I see. 7/21/52, it appears to be, 4:00 o'clock sent. I can't quite make that out.

“Steel Billets.

“84 Seattle Foundry advise one heat consisting of 8 billet tested by them as not over .80 manganese but Pittsburgh test ran .85 manganese, both tests ran .21 carbon. Suppliers request we cable for buyers authority ship since more manganese actually makes stronger billet.”

I would like to refer to Plaintiff's Exhibit 31 which has been admitted in evidence.

Q. (By Mr. Morrow): I ask you, Mr. Gips, what that wire is and where it went—where it originated and where it was sent?

(Testimony of Cyril Gregory Gips.)

A. That was sent to the Seattle office and it originated in San Francisco.

Q. Who sent it? A. May I read it?

Q. Well, I will read it. Who sent it through?

A. Which person?

Q. Yes, the person in San Francisco? [175]

A. I would have sent that.

Mr. Morrow: 7/21/52; 4:35 received.

“Steel billets for New Zealand. 50 steel billets your 84 please instruct Pittsburgh Test representative accept 8 billets however no further exceptions will be allowed in future.”

Q. (By Mr. Morrow): Now, Mr. Gips, in reference to receipt of Plaintiff's Exhibit 30, what did you do?

A. I called the Pittsburgh Testing Laboratory.

Q. Whom did you talk to? A. Mr. Clark.

Q. What day was that?

A. The same day we received the message.

Q. Yes; what was the subject of your discussion with Mr. Clark on July 21st?

A. I told them about this wire. I read it to him and we discussed it and Mr. Clark advised me that, as it was stated in the wire, the higher manganese content would not actually be regarded as a defect of the steel but it was correct to say that it would strengthen the material and that he suggested that as far as his knowledge of steel went there was no objection to accepting such a higher manganese content provided it was not done [176] consistently,

(Testimony of Cyril Gregory Gips.)

just happened once, there was no objection against that.

Q. And is this Plaintiff's Exhibit 31 your reply to the Seattle office following your talk with Mr. Clark?

A. Yes. On that advice I took it upon myself to authorize that deviation and to accept the eight billets, pointing out that no other exceptions could be allowed.

Mr. Morrow: Plaintiff's Exhibit 34.

(Whereupon, document was handed to counsel by the clerk.)

This exhibit has been admitted in evidence, your Honor.

The Court: What number is that?

Mr. Morrow: 34.

The Court: Do you wish to read it? [177]

* * *

Q. Now, where did you get your technical information in which to reply to that letter, Mr. Gips?

A. I spoke to Mr. Clark.

Q. You spoke to him? A. On the 'phone.

Q. Where did you get that?

A. I called him.

Q. Did you get the information from Mr. Clark?

A. Yes; he gave me that information. [180]

* * *

Plaintiff's Exhibit 37 has been admitted in evidence.

(Testimony of Cyril Gregory Gips.)

The Court: All right. You may read it if you wish. [181]

* * *

Q. (By Mr. Morrow): Mr. Gips, referring you to Plaintiff's Exhibit 37 which I have just read, the first invoice—there are other similar invoices—I will ask you if Plaintiff's Exhibit 37 came over your desk in San Francisco? A. Yes, it did.

Q. And do you know whether or not all of the invoices came over your desk?

A. Yes, they did.

Q. Did you indicate your approval of payment of the invoices?

A. Not in writing. If the invoice isn't approved by the person who had made the purchase, it is handed over without any accommodation unless there is a change or a difference; but, if it is approved as such it is handed over to the order clerk who stamps it and allocates the payment and sends it through to a vice president to be authorized for payment.

Q. What did you do on this occasion?

A. They were passed on to the order clerk—not immediately, though. Excuse me. There were some differences as to the amount of time spent on the inspection and—— [183]

Q. (Interposing): Pardon me for interrupting. I don't want to go into the question of any controversy over the statement, but I just simply want to, if you will, refer to the top one. Will you tell us

(Testimony of Cyril Gregory Gips.)

how that was handled for payment after it came over your desk?

A. Well, the amounts and rates are checked—were checked—by me and when found to be correct——

Q. (Interposing): Did you check this invoice?

A. Yes. [184]

* * *

Q. (By Mr. Morrow): Mr. Gips, I will ask you to identify Plaintiff's Exhibit—which has been marked Plaintiff's Exhibit 51 for identification.

Mr. Morrow: I might say this is one of those exhibits, your Honor, under Admitted Fact [185] 50 which was admitted as being correspondence in the regular course of business.

The Court: That is Exhibit number what?

The Witness: 51, your Honor.

The Court: 51? You are asking him to identify it?

Mr. Morrow: Yes; yes.

Q. (By Mr. Morrow, continuing): Would you?

A. It is a letter from W. Grace and Company, Washington, to Grace and Company in San Francisco referring to steel billets.

Q. That is sufficient. Does it also refer to an enclosure? A. Yes.

Q. Handing you what has been marked Plaintiff's Exhibit 50—no, this isn't the one. What is the date of that letter, Mr. Gips?

A. October 29, 1953.

Q. Oh, yes, I will ask you to state whether or

(Testimony of Cyril Gregory Gips.)

not, if you can, Plaintiff's Exhibit 50, which has been so marked for identification, is the enclosure mentioned in 51?

A. Yes, that is correct. [186]

Q. Can you state whether or not those two documents came to your attention and, if so, when they first came to your attention?

A. These were received by me or read by me on November 2nd, the date of receipt.

Q. Now the exhibit, Plaintiff's Exhibit 50, what has that reference to? I don't want the contents of it but what has it reference to?

A. It sets forth the exact amount of——

Q. (Interposing): No. The claim?

A. It is the value of the claim.

Q. The value of the claim?

A. Not the claim itself.

Mr. Morrow: I see. I am sorry, your Honor, I had the wrong documents.

The Court: You mean 50 was the wrong document?

Mr. Morrow: The testimony—the identification is satisfactory for this, but these documents came after. I want to refer to a document dated May 15, 1953, which is Plaintiff's Exhibit 42. The document which Mr. Gips has identified is a letter of transmittal, has already been identified as a letter of transmittal, dated October 29th, transmitting the claim of the New Zealand [187] Government Trade Commissioner, dated October 26, 1953, stating the value. Now, prior to that we had another letter

(Testimony of Cyril Gregory Gips.)

from the New Zealand Government Trade Commissioner which has been admitted as being genuine and as being one of Grace's documents.

Q. (By Mr. Morrow): I will ask you, Mr. Gips, whether you can further identify Plaintiff's Exhibit 42?

A. This is a letter written by the New Zealand Government Trade Commissioner in Washington, D. C., to W. Grace and Company, Washington, D. C., filing notice of claim and with an explanation as to the claim of material delivered.

Q. Now, I ask you if that document came to your attention? A. That is correct.

Mr. Morrow: I will offer the Plaintiff's Exhibit 41—is it—in evidence.

The Witness: 42.

Mr. Morrow: 42 in evidence. [188]

* * *

The Court: It may be received at this time for the limited purpose, namely, that there was a claim received in connection with the billets here involved.

(Plaintiff's Exhibit 42 admitted.)

Q. (By Mr. Morrow): Referring you to what has been marked Plaintiff's Exhibit 46, Mr. Gips, I will ask you if you can identify that?

A. I can. It is a letter written by W. Grace and Company, San Francisco, and addressed to Pittsburgh Testing Laboratory, dated May 22, 1953, and it is signed by me. It is a covering letter to a copy

(Testimony of Cyril Gregory Gips.)

of the New Zealand letter we had received pertaining to a claim which was the foregoing exhibit.

Mr. Morrow: I will offer the exhibit in evidence as Plaintiff's Exhibit 5 for the limited purpose of showing that the claim was submitted to the Pittsburgh Testing Laboratory under this letter of May 22, 1953, enclosing the claim of the [191] New Zealand Government Trade Commissioner of May 15th, being also in evidence as Plaintiff's Exhibit 42.

(Whereupon, Mr. Morrow conferred with Mr. Prince.)

Yes. That is 46. Will you correct that, Mr. Reporter?

Mr. Gantt: In that regard, your Honor, I don't want to delay with my point again. Our objection is that we have no objection if it is offered for the limited purpose of showing it was received and that a claim was sent to Pittsburgh, or a copy of the claim.

The Court: This claim.

Mr. Gantt: Yes; but not as to the truth of the matters alleged in 42.

The Court: I understand it is offered for that limited purpose.

Mr. Gantt: Yes.

The Court: And it may be admitted for that limited purpose.

(Plaintiff's Exhibit 46 admitted.)

Q. (By Mr. Morrow): Mr. Gips, with reference

(Testimony of Cyril Gregory Gips.)

to Plaintiff's [192] Exhibit 42 and Plaintiff's Exhibit 46, which I place before you, will you please state what you did upon receipt of the New Zealand Government Trade Commissioner's claim?

A. I read same through to acquaint myself with the contents as it appeared that the New Zealand Government alleged that the delivered material did not comply with their purchase from us. I checked the New Zealand purchase order with the—with our purchase to the Foundry and found no difference there and I then checked the—our purchase order—New Zealand Government's purchase order with the contract we had with Pittsburgh and there seemed no discrepancy there. I called Pittsburgh Testing Laboratory and——

Q. (Interposing): Now approximately when was that?

A. I couldn't pinpoint the day, but it was upon receipt of the claim of the New Zealand Government.

Q. When was it in respect to your transmitting the claim to Pittsburgh which is dated——

A. (Interposing): The date we received New Zealand's claim, Exhibit Number 42, was probably received approximately May 19th—around [193] there. That is approximately the date, or it may have been the next day. I do not know if there were any Saturdays or Sundays involved there, but I called Pittsburgh Testing Laboratory and I advised them that we had received a letter claim—filing the claim—notice of claim—on the merchandise

(Testimony of Cyril Gregory Gips.)

which we had delivered and which they had inspected and guaranteed to be in conformity with our purchase order and contracts and I did not attempt to read the whole letter.

We arranged a meeting in the office of Pittsburgh Testing Laboratory and I went down there and spoke to Mr. Robinson and Mr. Clark and showed them the letter, which is here as Exhibit Number 42, and it was decided that they could not immediately check upon everything, this being a very long and complicated letter, and Mr. Clark said that he would check it with the specifications in the book he had on specifications and I remember going with him to his office and we looked for a specification and we couldn't find one at that moment and he asked me to give him a copy of the claim, which I promised and which I did, and sent one to him under cover of my letter of May 22nd.

Q. And which Exhibit Number is that you [194] are referring to?

A. It is Exhibit number 46, which enclosed a copy of a letter which I had previously shown to them. In that covering letter I requested him to advise me the reasons why there was the possibility of a claim inasmuch as they had inspected the material before we had it shipped out.

Mr. Morrow: May I have Plaintiff's Exhibit 49?

(Whereupon, document was handed to Counsel by the Clerk.)

Has this been admitted?

(Testimony of Cyril Gregory Gips.)

The Clerk: Yes.

Mr. Morrow: Plaintiff's Exhibit 49 has been admitted, your Honor, and I would like to read it.

The Court: Yes. [195]

* * *

Now I would like to offer in evidence Plaintiff's Exhibit 51 and Plaintiff's Exhibit 50. Plaintiff's Exhibit 51 has been identified as a letter of transmittal submitting the claim of the New Zealand Government Trade Commissioner and setting forth details of computation and the valuation of their claim.

The Court: Is this 51?

Mr. Morrow: This is Exhibit 50, the letter, the New Zealand Government Trade Commissioner letter and 51 is the letter of transmittal.

Mr. Gantt: If the Court please, the same objection made to Exhibits 51 and 50 as was made to Exhibits 42 and 46. That is, that if the exhibits are offered to prove the truth of the matters therein stated, we object to their being so offered. There is not an objection to their being offered for the limited purpose of showing that they were received by Grace and Company in San Francisco or in Washington, for that matter. I think number 50 is—our reasons for that objection were those stated in the prior objection. They are not business records of Grace and Company.

The Court: Do I understand that you would not object to the exhibit—this is 50, which is [197] the

(Testimony of Cyril Gregory Gips.)

letter signed by—presumably by—one Wooder, the Trade Commissioner for the New Zealand Government Trade Commission, addressed to Grace in Washington—you would not object that a claim in an amount set forth in there was made?

Mr. Gantt: No, we would not object on that ground, to show the claim.

Mr. Morrow: I will offer them for that limited purpose at this time. In respect to both of these documents and the other documents, I, of course, wish to reserve the right to offer them for other purposes.

The Court: If offered for another purpose we have another question.

Mr. Gantt: Surely.

The Court: Plaintiff's Exhibits 50 and 51 may be admitted for the limited purpose as stated at this time.

(Plaintiff's Exhibits 50 and 51 admitted.)

Mr. Morrow: I would like to offer Plaintiff's Exhibit 52 in evidence at this time for the limited purpose of showing the amounts, or the amount, of the revised claim of the New Zealand Government Trade Commissioner to Grace and [198] Company, dated August 6, 1954.

Mr. Gantt: The same objection in that we do not object to its being offered for the limited purpose of showing that a claim was received in that amount stated in the letter, August 6th, being Exhibit 52.

The Court: That is the purpose at this time?

(Testimony of Cyril Gregory Gips.)

Mr. Morrow: Yes.

The Court: All right; it may be admitted at this time for that limited purpose.

(Plaintiff's Exhibit 52 admitted.)

It is the revised claim, is it?

Mr. Morrow: Yes.

The Court: It is revised?

Mr. Morrow: Yes, that is a revised claim. Simply, the revised claim, your Honor, is \$21,747.24, which is the amount which was paid by the Grace and Company under, I believe, the admitted facts. That is all the questions I have from Mr. Gips at this time.

Cross-Examination

By Mr. Gantt:

Q. Mr. Gips, when did you say, sir, you [199] came to work for the Grace and Company; first started work? A. I beg pardon?

Q. When did you first start to work for them?

A. I believe it was approximately July of 1951.

Q. What had been your experience in the export business prior to that; how many years, approximately? A. Approximately four years.

Q. Most of that in South America, was it?

A. That is correct.

Q. Any of it in the United States?

A. No; no.

Q. Are you an American citizen?

A. I am not.

(Testimony of Cyril Gregory Gips.)

Q. You are? A. I am not.

Q. How many years have you been living in the United States?

A. Approximately four and a half years.

Q. And what nationality are you, sir?

A. I am a Dutchman.

Q. Who is your superior or who was your [200] superior in the period that you have been testifying to; superior in Grace and Company during the period, say, April through July, 1952?

A. Mr. G. H. Mahoney.

Q. What was his then title down there?

A. At that time it was under the company's title of W. Grace and Company; he was manager.

Q. And he was your immediate superior?

A. That is correct.

Q. Did you discuss the matter relating to this inquiry from Washington, which is Exhibit 1, with Mr. Mahoney? A. I beg your pardon, sir?

Q. Did you discuss Plaintiff's Exhibit 1, which is the inquiry, dated April 3, 1952, with Mr. Mahoney upon receipt of it by you?

A. I believe I did. I am not quite sure but I think I did.

Q. Did you consult with Mr. Mahoney from time to time during the transaction?

A. I do remember having consulted him when we received a second offer on the same inquiry from our Seattle office, which was the offer of Seattle Foundry Company.

Q. Now, I believe you testified that you [201]

(Testimony of Cyril Gregory Gips.)

had, prior to the receipt of this letter in April, 1952, Exhibit 1, you had had other steel transactions?

A. That is correct.

Q. In the export department in San Francisco?

A. That is correct.

Q. And I believe you testified that they related to the purchase by Grace to fill orders of steel bars and what was the other product?

A. Steel pipe.

Q. And I also think you testified that they called for steel according to certain specifications?

A. That is correct.

Q. What were those specifications, if you recall?

A. I recall they were an ASTM specification but I could not give you the number.

Q. But they were a particular ASTM specification?

A. Yes; that is correct.

Q. How many such transactions would you say that you had had dealing in steel pipe or bars for W. R. Grace prior to this matter in dispute here?

A. It is very hard to give you any exact [202] idea but I would say about one dozen, perhaps; six to a dozen.

Q. And in any of those transactions had you occasion to consult the specifications yourself?

A. No, we do not consult specifications.

Q. Did you have occasion to discuss the subject of the specifications with the experts, with any expert, on the subject such as an engineer?

A. No, we do not. We pass—most of those inquiries are not passed on to us with the specifica-

(Testimony of Cyril Gregory Gips.)

tions. Some of them are and if the specifications are given to us we just pass it on with the purchase order to the supplier.

Q. So then, other than reference to a particular specification, you don't really know what you are ordering, do you?

A. Yes, we do. We give a description of the material, the way it is ordered, and we put in the specification it is ordered from us. That is exactly the way, verbatim, that we pass it on, to our supplier.

Q. Now, Mr. Gips, when you first received Exhibit 1, which is the letter of April 3rd, from your Washington office, in that letter, I believe, if you will refer to Plaintiff's Exhibit 1, you will see [203] under the description of the billets on the second line there the phrase "or nearest equivalent"?

A. That is correct.

Q. In other words, reading from Exhibit 1 it states:

"Steel billets, specification ASTM, type A, grade two, or nearest equivalent"?

A. That is correct.

Q. And I believe it says the same for item two, relating to the other size. Now, what is the meaning of "or nearest equivalent," or do you know?

A. Well, that would be a question for probably an expert to answer. I could not tell you what the nearest equivalent to that question is. If it would be required of me to answer it, I would call upon an expert to answer it for me.

(Testimony of Cyril Gregory Gips.)

Q. You didn't do that in this case?

A. No, I did not. I believe I never did use that term in any of my contacts, "or nearest equivalent." If I had, I would probably have identified the nearest equivalent by consulting an expert.

Q. Handing you Plaintiff's Exhibit Number 2, will you read the description of the billets? First, tell us what is this exhibit again?

A. It is number 45. [204]

Q. No, at the bottom. It is Exhibit 2 in this case, but what is it? A. Excuse me.

Q. It is a letter signed by you, is it?

A. It is a letter signed by me.

Q. To your Seattle office?

A. Referring to steel billets, addressed to Grace, Seattle office.

Q. And will you observe there whether the phrase "nearest equivalent" appears in the description of the billets?

A. It does. However, it is not a contract.

Q. I didn't ask you whether it was a contract. I just asked you whether it appears there.

A. It appears there.

Q. Read how it appears in the first instance.

A. "Steel billets, specification A-17/29, type A, Grade 2, or nearest equivalent."

Q. Now, you used the phrase then in that letter and did you know what the nearest equivalent was then? A. No, I did not.

Q. Now, I believe you testified that upon receiving the Exhibit 1 you shortly thereafter sent [205]

(Testimony of Cyril Gregory Gips.)

off Exhibit 2, but prior to sending off Exhibit 2, being the letter of April 17th, you contacted a friend of yours named Mr. Gleason at Kaiser Steel?

A. That is correct.

Q. What was his position over there at that time?

A. He was—I believe he still is—the export manager for Kaiser Steel.

Q. Export manager?

A. Export manager. The only business I conducted with him was on steel pipes. I do not know if he also handles other materials for Kaiser for export.

The Court: Did you say export?

The Witness: Export items.

The Court: I see.

Q. (By Mr. Gantt): Now, will you try to tell us what your conversation with Mr. Gleason was at that time?

A. I advised him that we had an inquiry for steel billets. I may have read him the inquiring letter and asked him if he knew of a possible supplier for this type of material, if he could advise me whom to contact, and he mentioned to me two companies up in the Northwest which he thought [206] might be able to do such work and he told me to contact them.

Q. Did you discuss with him getting the work done or getting the product produced from someone in the San Francisco Bay area?

A. Yes, I did ask him if there were no sup-

(Testimony of Cyril Gregory Gips.)

pliers in Northern California or Southern California who might be able to furnish this material.

Q. What did he say?

A. He told me that as far as he knew there were no suppliers available that were at that moment in a position to furnish that material.

Q. When you say were not at that moment in a position to furnish that material, who do you mean by that?

A. Well, at that moment there was a steel shortage and many steel mills were over booked and producing, I understand, in capacity. It was difficult to get on a mill schedule, get a mill, steel mill, to offer you material. Most people at that time, and particularly for export, were allocated certain quantities of steel which they could export. They could not export unlimited quantities.

Q. Now, there are other large steel suppliers in the San Francisco Bay area that you are [207] aware of?

A. For different items there are all sorts of steel suppliers in the Bay area.

Q. There are steel rolling mills? In the Bay area?

A. Well, I am not aware but possibly people like Bethlehem. I do not know if U. S. Steel has a rolling mill there. I am not too well acquainted with their facilities. I do know they work in that area but I do not know if they have facilities to roll material or anything like that.

(Testimony of Cyril Gregory Gips.)

Q. You did not inquire of any other steel supplier in the San Francisco area?

A. Well, we used to, I understand, although I personally never exported any of their materials—used to ask upon those from Kaiser, with people like U. S. Steel and Bethlehem on different items, barbed wire and things like that, but for many years during the war and postwar years those big companies were so overloaded with orders that they did not take any order for export at all unless it was possibly for one of their own representatives.

Q. The fact is you didn't call any of those others?

A. No, because they had systematically [208] declined to make any offers on steel material.

Q. Did you have any correspondence with any steel suppliers in the San Francisco area as a result of the letter of inquiry from your Washington office? A. No.

Q. Now, did you discuss at all with Mr. Gleason the product that you were seeking to obtain to fill the order for the New Zealand Government?

A. I gave them the product that was required as it states on the letter from Washington inquiry and I just told them this is the type of material we are supposed to quote on and who do you think can manufacture this type.

Q. Was there any discussion as to what the type of material was or how it was to be manufactured?

A. I don't think so.

Q. You say you don't think so?

(Testimony of Cyril Gregory Gips.)

A. I am quite sure we didn't discuss that.

Q. Now, Mr. Gips, the first indication that you had of any supplier on this order you received in the letter of May 1st from Mr. Schlaugh, Exhibit 5, is that correct—the letter referring to Isaacson and Seidelhuber? [209]

A. That is correct.

Q. And you took that to be a firm offer from Seidelhuber?

A. Yes, it was a firm offer.

Q. From Isaacson, I beg your pardon?

A. Yes, it was a firm offer from Isaacson.

Q. You will notice in this letter, paragraph two, relating to Seidelhuber and Isaacson:

“Seidelhuber Iron and Bronze Works, Seattle, advise they would be able to offer forging quality ingots which will have the quality of steel billets. They would not be able to offer sizes specified but could offer them in sizes 12" by 12" in lengths up to 54", 20" by 20" up to 70" and 25" by 25" up to 59". They would like to know for what part of the locomotive these billets are required and would like to know if forging quality ingots will suffice. They are not on strike but do advise that they will probably be out of the market within three weeks inasmuch as there is now a huge demand.”

Did you do anything about the reference to the Seidelhuber quotation or the Seidelhuber reference which is made or contained in this letter?

A. No, I did not.

Q. You didn't consult anyone as to what [210] quality forging ingots were?

A. No.

Q. Or forging quality ingots?

A. No.

(Testimony of Cyril Gregory Gips.)

Q. Which would have the quality of steel billets?

A. No.

Q. Was this letter put in your file in San Francisco?

A. No, I used that letter, the first part of that letter, for the Isaacson quotation. I kept it as such on my desk with my current papers.

Q. Would you say that was part of a file on this matter?

A. Oh, yes, I kept it with my papers attached to the letter and inquiry from Washington.

Q. But you made no inquiry about forging quality ingots? A. No.

Q. Now, other than Mr. Gleason referring you to Isaacson Iron Works, did you have any reason to know or to do business with Isaacson Iron Works prior to your letter here?

A. If I had done any business with them?

Q. Yes. [211]

A. No, I had done no business with them.

Q. And did you know them in any other way other than Mr. Gleason having referred you to them?

A. No. He referred to them as being one of the best known and largest steel manufacturers in the Northwest.

Q. How did he refer to Seidelhuber?

A. Also as a reliable supplier.

Q. You didn't know them other than that?

A. I didn't know them.

Q. Now, you stated that upon receiving Plain-

(Testimony of Cyril Gregory Gips.)

tiff's Exhibit 5 you thereupon got off your letter to Washington and the letter that you wrote to Washington—your Washington office—was Exhibit 8, the letter of May 6th, is that correct, in which you quoted the Isaacson price? A. Yes.

Q. Now, I would like to refer to the method by which you computed the price which you were offering to your Washington office. In other words, the Isaacson order which Mr. Schlaugh sent you in Exhibit 5, the Isaacson offer, was for 750 billets at \$157.50? You will note that in Exhibit 5.

A. Yes.

Q. And then in Exhibit 8 you have quoted [212] a price to your Washington office of 750 billets at a price of \$168.35. In other words, there is a difference there of approximately eleven dollars?

A. Yes.

Q. Ten or eleven dollars; what is that difference? How did you make up that difference and how did you compute the price appearing in your Exhibit 8?

A. The price of \$157.50 was, of course, the base price and then we have to add on charges to—dock charges to make it on an F.A.S. schedule, dock basis, on which basis we are offering.

Then we add on our margin and that was in this case—because we like to have as large a possible margin as we can obtain, but we felt we couldn't get more than five per cent on it at the most being more or less competitive and standing a chance of getting the business, and we have to add one addi-

(Testimony of Cyril Gregory Gips.)

tional per cent for our Seattle office from whose territory it would be supplied and who would demand a purchase commission which is usually one per cent.

Q. I want to refer you, for a moment, to Exhibit 5 and the price that Mr. Schlaugh quoted you for Isaacson has a figure for F.A.S. Your figure [213] was F.A.S., which means free aboard ship?

A. Freight alongside ship.

Q. Seattle? A. Yes.

Q. Did he give you a figure?

A. He gave me a figure F.O.B. car dock. That is, usually the manufacturer puts the merchandise on a railroad car and ships it for his expense and account to the dock but once on the dock it has to be discharged and handled and there are tolls involved on the piers before it becomes alongside the vessel, and that he refers to. He says, "Add \$1.32 per two thousand pounds for F.A.S. Seattle." He indicates that the tolls and handling charges on the dock amount to \$1.32.

Q. Then you added \$1.32 per ton?

A. That is correct.

Q. To the \$157.50 appearing in Mr. Schlaugh's letter, Exhibit 5? A. That is correct.

Q. Right? A. Yes.

Q. And the difference between \$1.32 and \$157.50 and the price which you quoted Washington, is that all profit? [214] A. Well——

Q. (Interposing): That is all gross profit, isn't it?

(Testimony of Cyril Gregory Gips.)

A. We may have had—you see, there are other expenses involved. There is a matter of making documents, of wires, cables, and so on. I may have taken a fixed charged for that and thrown that in on a total quantity, you see?

Q. Is it usual to write in such a fixed charge?

A. Oh, yes, we always add on a fixed charge that we throw in for cables, wires, expenses of making up documents.

Q. How was that computed? How was that computed here?

A. It depends much on the merchandise you are handling because the charges are all more or less the same; on how many shipments you are going to make because each time you make a shipment you start running into the same expenses. If you make one shipment you have the expenses once but if you make three shipments you have three times that expense, so that, inasmuch as you don't always know whether you will make one or two shipments on it, or maybe a large one, because [215] there may not be space available, or the merchandise may not be ready at the one time, you take it on the thicker side and throw in twice the amount you would take for one shipment.

Q. You don't know how much that fixed charge you added here was?

A. Well, I haven't—if you want me to, I can compute it back and see what was in there but I wouldn't remember offhand what I used at that time.

(Testimony of Cyril Gregory Gips.)

Q. Now, Mr. Gips, I want to show you Exhibit 9 for a moment, which is the letter of May 8, 1952, from Mr. Schlaugh to yourself, or to your Grace office in San Francisco. That letter, I believe you have testified, was the first price quotation you had received from Seattle Foundry through Mr. Schlaugh; is that correct? A. Yes.

Q. These are the Seattle Foundry prices?

A. Yes.

Q. Now, let's examine for a moment those prices. The larger item here of 750 billets, what was the price quoted by Seattle Foundry as quoted by Mr. Schlaugh?

A. \$120 per net ton. [216]

Q. As against the Isaacson price of \$157.50. Now, that is \$37.50 per net ton, isn't it?

A. Difference?

Q. Difference. A. Yes.

Q. Lower? A. That is correct.

Q. Did you have occasion to compute at the time you had these two offers what that difference would amount to in profit? A. Yes.

Q. In other words, you wrote your letter on to Washington setting the price at \$168, is it?

A. You took the papers.

Q. \$168.35 is the figure you have for F.A.S. Seattle? A. Yes, \$168.35.

Q. So then the Seattle Foundry price to you was going to be \$120 a ton on this larger item of billets as against the quote that you had sent to your Washington office of \$168.35; right?

(Testimony of Cyril Gregory Gips.)

A. Yes. Well, excuse me for interrupting you but this is price per net ton F.O.B. Foundry and then to that you add on the additional \$3.00 so that it is actually \$123.00 F.O.S. basis as against [217] the other one also F.A.S. basis.

Q. In other words, you had to consider at that time Isaacson's price of \$157.50 and Foundry's price of \$123.00? A. Yes.

Q. So that there is a difference of about \$34 or \$35 per net ton? A. Approximately.

Q. So that now, what would that have worked out on a profit basis to Grace then?

A. Considerably higher amount of profit.

Q. When you say considerable, I think you said you had worked that out at one time. Do you recall what the difference was for the whole order? That is a gross profit figure now.

A. Well, offhand—I know I have calculated it but I couldn't tell you.

Q. Could it have been six or seven or eight thousand dollars; could it be that much?

A. Oh, yes, it could be on the total order.

Q. That is just on the total order?

A. The total profit if one took the cost of Seattle Foundry's offer as against the selling price we quoted Washington.

Q. Yes, that is what I am driving at. [218]

A. Yes.

Q. Now, didn't—weren't you concerned over the difference in price? A. A little bit, yes.

Q. Weren't you just a little bit more than a lit-

(Testimony of Cyril Gregory Gips.)

tle bit? In other words, you are in the export business? A. Yes.

Q. And you had been in the export business for four years, approximately four years, before this and here you had an item which was referred to by standard specifications to obtain inquiries on and you were getting two answers to your inquiry from the same city—in other words, Seattle?

A. Yes.

Q. And one of them was from a reliable firm or what had been told to you to be a reliable firm?

A. Yes.

Q. For a price that was about \$35.00 a ton difference? A. That is correct.

Q. Amounting then, as you say, to as high as six, seven or eight thousand dollars; wasn't that an unusual profit or an unusually big differential between those two price quotations? [219]

A. I wouldn't say the profit because at that moment we hadn't sold the merchandise yet.

Q. Strike that—but an unusually large price differential in the price offered?

A. Yes, it seems rather large.

Q. In fact, in the years you have been in the export business have you ever seen one that varied that much? A. I have seen them, yes.

Q. You have seen them? A. Yes.

Q. Do you recall anything specifically like that?

A. One may find it in certain commodities—in lumber.

(Testimony of Cyril Gregory Gips.)

Q. Have you ever seen that big a variation in steel?

A. No, not in steel. I have always bought steel more or less at a fixed price and never had to dicker for a price.

Q. Now, then, there is another paragraph in this letter of May 8th. At the bottom it says—this is Exhibit 9—these billets are cast steel from sand molds and item two will weight 515 pounds each and—item one, 515 pounds each, and item two 475 pounds [220] each—these are from sand molds—that appears in that letter that Mr. Schlaugh wrote you?

A. Yes.

Q. In the last paragraph of Exhibit 9?

A. Yes.

Q. Now, does that mean anything to you?

Mr. Morrow: I wish to object to this question. It is not a question or issue brought out on the direct examination. The testimony that is sought to be elicited now may be admissible for some purpose but I wish to make the objection that if it is being offered or attempt is being made to use it for the purpose of contradicting the written contract between the Grace Company and the Pittsburgh Company, then I must object.

The Court: Well, the exhibit is in and he said he received it and now he is asking about the contents of it.

Mr. Gantt: He testified on direct. In fact, it was let in over objection.

The Court: Objection overruled.

(Testimony of Cyril Gregory Gips.)

Mr. Gantt: May the Reporter read the question?

The Court: The Reporter will read the [221] question.

(Whereupon, the following was read by the Reporter: "Q. Now, does that mean anything to you?"')

The Court: Is the question: "Did it mean anything to you," Mr. Gantt?

Q. (By Mr. Gantt, continuing): Did it mean anything to you?

A. Just the phrase, "These billets are cast from sand molds"?

Q. Yes.

A. No, it did not mean anything to me.

Q. Did you do anything about it at that time?

A. No.

Q. Did you discuss it with Mr. Mahoney?

A. No, I did not.

Q. Did you discuss the price differential with Mr. Mahoney? A. I did.

Q. What did he say to you, if you recall?

A. A thing like that one, it seemed rather strange to me there was such a large difference and I suggested we should check back with the suppliers, that they are offering the same material and that they have made no mistake in the computation of their offer to us. It is always possible. I [222] have seen it happen time and again, somebody offers you something and it seems rather a strange difference, sometimes very high and sometimes very

(Testimony of Cyril Gregory Gips.)

low, above or below the market price, and upon checking they find they made an error somewhere in their calculations and adjust it, and whenever possible we always try to have that adjusted before we go in and finalize the business.

Q. Now, was this letter, Plaintiff's Exhibit 9, that you have just been testifying to, was that put in your file on this transaction, too? A. Yes.

Q. Now, with regard to the date you received the New Zealand Government's purchase order, which is exhibit—Plaintiff's Exhibit—11——

(Whereupon, document was handed to the witness by Counsel.)

A. Thank you.

Q. I think you have testified you received that on what date? A. On May 15, 1952.

Q. And now the prices contained in the New Zealand Government's purchase order to you, being attached here to Exhibit 9, were those prices in accordance with the letter that you had written to [223] your Washington office, being Exhibit 5?

A. Excuse me, I have to check.

Q. Will you just look at them and check? They are the same?

A. Yes, they are the same.

Q. So then your order to the New Zealand Government was based on the prices, was prepared and based on the prices, you had received from Isaacson Iron Works? A. That is correct, yes.

(Testimony of Cyril Gregory Gips.)

Q. And you just testified you received this exhibit, this letter, from Washington on the 13th?

A. 15th; it was written on the 13th and received on the 15th.

Q. I see; now, you testified earlier that you had occasion to call this Mr. Gleason again with regard to obtaining an inspection on the products you were going to get from the Foundry? A. Yes.

Q. And I believe you testified that you contacted Mr. Gleason some time after the 9th and before—some time after the 12th and before the 15th?

A. That is correct.

Q. At the time you discussed the matter of obtaining someone to give you an inspection [224] with Mr. Gleason did you go into the question of the price differential between these two offers?

A. Excuse me, with Mr. Gleason?

Q. Yes. A. No; no, I wouldn't.

Q. You were considering those two offers at the time, you testified, the Isaacson offer and Foundry's? A. Definitely, yes.

Q. You did not discuss the price differential?

A. No.

Q. Did you discuss the product at all again with him? A. No.

Q. As to what the product was to be; how it was to be manufactured? A. No.

Q. Did you at that time discuss specifications with him? A. No, I did not.

Q. Now, did you at any time obtain a credit report on the Foundry?

(Testimony of Cyril Gregory Gips.)

A. I have seen one. I do not think I obtained it. If I remember correctly, there was one sent on by our Seattle office here to San Francisco [225] and I——

The Court (Interposing): Was this before; you are talking now about before the contract was entered into?

Mr. Gantt: Yes.

The Witness: No, I had not seen one. The one I have seen was much later.

Q. (By Mr. Gantt): Did you at any time obtain or request—did you request—a credit report on Seattle Foundry?

A. I may have but I frankly do not remember having done so. I don't think I had one.

Q. Do you know whether the Seattle office of Grace obtained a credit report?

A. I know they obtained one later on. I don't know when they applied for it but I know later on we received a copy of it.

Q. Did that come to you in San Francisco?

A. That is right. They forwarded it to us.

Q. Now, did you ever acknowledge receipt of the New Zealand Government's purchase order attached to Exhibit 11? I mean by that, did you ever acknowledge receipt to your Washington office or to the New Zealand Government Trade Commissioner in Washington?

A. I don't think I did. It would not be up [226] to us to do so. I may have but I do not remember it unless the files would so show. I don't think I

(Testimony of Cyril Gregory Gips.)

did. Excuse me, perhaps I could tell. Apparently, it looks here I answered them on May 20th. It would look that way but I don't know what that would refer to.

Q. Do you usually acknowledge receipt of purchase orders?

A. Not necessarily. We usually—after we have been trading with a client back and forth and he finally agrees to the material and price and conditions of sale, we obtain a purchase order. We do not necessarily make up a—in the case of the government we do not make up a counter contract like we would with a commercial house. In that case we would make up a contract with them and make them sign it, that we have sold them such and such merchandise, on such and such terms, but you do not do that with the government because the government does not recognize your contract. They have their own purchase orders and they regard that as final.

Q. And your purchase order here was the New Zealand Government Trade Commission form, wasn't it? [227]

A. Yes, that is right.

Q. That was his form?

A. Yes.

Q. Now——

The Court: Would you like to take a recess now?

Mr. Gantt: Yes, that is all right with me.

The Court: The Court will take a fifteen-minute recess.

(Testimony of Cyril Gregory Gips.)

(Whereupon, at 3:15 o'clock p.m. a recess was had in the within-entitled and numbered cause until 3:31 o'clock p.m., November 30, 1955, at which time Counsel, heretofore noted being present, the following proceedings were had, to wit.)

The Court: You may proceed.

Q. (By Mr. Gantt, continuing): Mr. Gips, again referring to your telephone conversations with Mr. Gleason at Kaiser, did you have occasion in either of those telephone conversations to mention Seattle Foundry or that you were considering having Seattle Foundry fill the order?

A. No, I don't think so.

Q. In the second conversation concerning [228] getting an inspector you didn't mention Seattle Foundry either?

A. I don't think so. I cannot be sure. It was several years ago. There was no need to mention it so that I don't believe I did.

Q. Did you explain to him why you wanted an inspector?

A. I don't think so either. I just asked him that we required a reliable inspection service for—I recalled to him the previous conversation when I asked for suppliers of this type of material and said, "We now require an inspection service for this order and would like to know do you happen to know anybody that does this type of business?"

(Testimony of Cyril Gregory Gips.)

At that time he mentioned Pittsburgh Testing Laboratory.

Q. Now, Mr. Gips, when you received Exhibit 8 from Mr. Schlaugh, being a letter of May 6th referring you to——

Mr. Gantt: Strike that. That is incorrect. It is Exhibit 9.

Q. (By Mr. Gantt, continuing): ——in which Mr. Schlaugh made the quotations from the Foundry offer? A. Yes.

Q. Mr. Schlaugh's letter? [229] A. Yes.

Q. What is the date of it again?

A. It is dated the 8th of May, received on the 9th.

Q. Did you do anything about—at the time of receipt of that letter from Mr. Schlaugh you had sent out the letter of May 6th to Washington setting for the Isaacson price?

A. I know I sent that one.

Q. After receipt of this letter from Mr. Schlaugh regarding the Foundry prices, which you testified were considerably lower——

A. (Interposing): Yes.

Q. (Continuing): ——did you do anything about passing that information on to Washington in the form of a new order?

A. No, I did not.

Q. Or a new quotation of a lower price?

A. No.

Q. Why didn't you?

A. Well, on May 9th I recall—if I could refer

(Testimony of Cyril Gregory Gips.)

to the exhibits—I believe on May 9th we received a wire at the start of business from Washington and I don't know if it was exactly that wire—I believe there were two wires and one of [230] them states that they expected to mail us the order by Monday. Am I correct there again?

Q. I am looking.

A. That is the reason I would not at that time have interfered with my earlier quotation—because there was no need to do so.

Q. Well, Exhibit 10 refers to a letter by you to your Seattle office and you say, “We have received a telegram from our Washington office informing us they expect to close the sale on the 12th.” Is that the wire you are talking about?

A. This is the letter. I was referring to the wire I had received on the same day as this letter, this quotation.

Q. I see.

A. You will find it in the exhibits. I don't remember the number of the exhibit.

Q. Am I correct in assuming you did not tell your Washington office of the lower price from Foundry?

A. No. I do remember having mentioned in one of my—in my original offer to them it was based on a quotation from Isaacson Iron Workers and I mentioned later in a letter to them that if they had not previously mentioned to the client who the supplier [231] was that there was a possibility that we would change suppliers. I did mention that in

(Testimony of Cyril Gregory Gips.)

one of my letters to Washington on or about that period.

Q. Well, now, that is not this Exhibit 8, the letter of May 6th, in which you advise them of the Isaacson offer?

A. No. This is the letter—the offer—I made on the basis of the Isaacson offer or bid.

Q. Yes.

A. And there is a later letter. Perhaps it is also of the 9th of May, to Washington. I haven't got it in front of me.

Mr. Morrow: I sorry, Mr. Gantt. I have a copy of that letter which just came to our attention and I have no objection. I intended to put it in evidence later. You may use it.

Mr. Gantt: Will the Court excuse me just a second while I take a look? We have never seen it before.

(Whereupon, there was a brief pause.)

Q. (By Mr. Gantt): Mr. Gips, I would like to show you what I believe has been marked Exhibit 20, which is a letter dated May 16th, addressed to Seattle Foundry, signed by Mr. Vanderbilt. Will you examine that [232] Exhibit 20 and tell me when you first—when it first came to your attention?

A. Mr. Gantt, I think that I did not see this letter until after the claim was filed by the New Zealand Government. This is a letter, as you say, from Grace Seattle to Seattle Foundry. I don't think I did see a copy of this letter within a year after it was dated.

(Testimony of Cyril Gregory Gips.)

Q. I see; now, you have previously identified one of the exhibits as being your purchase order. You referred to it in Exhibit 19, being dated May 15th, as a purchase order and I think you have identified your signature on the bottom of it.

A. Yes.

Q. That is your purchase order from your San Francisco office to your Seattle office?

A. Yes.

Q. Will you tell us what that is? Is that an inter-office transaction?

A. No. This is a standard purchase order form which we use in the export department for all commodities and for all purchases to any supplier and it is also used inter-office to confirm a sale. It comes in a book form, the original and a duplicate, and there is no other printed form. These [233] are the only two printed ones but the book is kept and additional copies are kept in the book later on, the signed one which is returned by the supplier. You see, this one was signed by Mr. Vanderbilt by his initials and apparently returned to us, as stated this morning, and then returned to that book and knitted in there and kept on record. In other words, we have a record of confirmed purchase orders from all suppliers in that book in chronological order.

Q. This one was confirmed by Mr. Vanderbilt?

A. Yes.

Q. Not by the Foundry?

A. No, because we did not have direct contact

(Testimony of Cyril Gregory Gips.)

with the Foundry. Our office relays it on and later on whatever they use with their supplier.

Q. So that in this case it was an interoffice transaction?

A. In this case it was an interoffice transaction.

Q. Between the Seattle office of Grace and San Francisco?

The Court: Is that 24?

Mr. Gantt: That is Exhibit—well, your Honor, it is a portion of Exhibit 19, the purchase [234] order attached to Exhibit 19.

Q. (By Mr. Gantt, continuing): And you prepared that, did you, Mr. Gips? A. Yes.

Q. That purchase order? A. Yes.

Q. Dated May 15th; now, do you know what a plant certificate is?

A. That would be a certificate by a manufacturer that he certifies that the material he has provided and he describes in that certificate is in accordance with a certain specification.

Q. Now, did you require that here from Seattle Foundry?

A. No, I didn't require it. We didn't ask for it.

Q. Now, will you examine Exhibit 20 and tell me if Mr. Vanderbilt's letter to the Foundry requires a plant certificate?

Mr. Morrow: I didn't get that question. Pardon me.

The Court: The Reporter will read the question.

(Testimony of Cyril Gregory Gips.)

(Whereupon, the following was read [235] by the Reporter: "Q. Now, will you examine Exhibit 20 and tell me if Mr. Vanderbilt's letter to the Foundry requires a plant certificate?")

A. He refers to an understanding that the Seattle Foundry will furnish a plant certificate.

Q. (By Mr. Gantt): Do you know if any plant certificates were furnished here to Grace by the Foundry?

A. I don't think they were. They were not required by us. They may have been received by our Seattle office. However, inasmuch as we didn't insist upon it, I don't really know if they ever got them or requested them.

Q. Did you have occasion to discuss with Mr. Mahoney, your immediate superior, the decision by you to accept the Seattle Foundry offer? I believe you stated you advised, both by telephone and wire and letter on May 15th—you advised Mr. Schlaugh up here in Seattle—to confirm acceptance of the Foundry offer? A. Yes.

Q. Prior to doing that, did you discuss the matter of such a confirmation or such a placing of an order with Mr. Mahoney? [236]

A. Yes, I did tell him inasmuch as I had taken the matter up previously with him. It was usual to follow through and tell him what you had done. And we had discussed it and he asked me how we got—who Seattle Foundry was and I told him we

(Testimony of Cyril Gregory Gips.)

had received a quotation from our Seattle office but that they had not been recommended to us by our usual steel relations and didn't actually know anything about them and they were not known to us and, therefore, we discussed it, that we ought to do something to protect ourselves that these not well-known manufacturers would deliver to us the goods we ordered from them.

Q. Now, Mr. Gips, your letter of May 15th, which is Exhibit 19, your letter to Grace in Seattle, Mr. Schlaugh, refers to a teletype, number 18, which is in evidence here? A. Yes.

Q. And to “* * * our today's telephone conversation between your Mr. W. H. Schlaugh and our Mr. C. G. Gips * * *” Do you recall that telephone conversation with Mr. Schlaugh, which apparently took place May 15th?

A. To be frank with you, I have no doubt it took place because it states it there but I would honestly not remember what it refers to; I [237] mean, what the conversation was about.

Q. Now, at the time of that telephone conversation with Mr. Schlaugh, did you have Plaintiff's Exhibit 9 in your—I guess you have it there, do you? A. Yes, I have it.

Q. Was that in your file? That is the letter from Mr. Schlaugh to you on May 8th?

A. Yes.

Q. It represents at the bottom that these are cast steel billets from sand molds?

A. That is correct.

(Testimony of Cyril Gregory Gips.)

Q. Did you have that in your file the day you talked to Mr. Schlaugh?

A. That is correct.

Q. Do you know whether you had occasion to refer to that particular letter or not?

A. I don't remember frankly.

Q. But it was there on your desk?

A. It was with the other documents; yes.

Q. Now, you testified as to certain conversations between yourself and Mr. Clark, and I believe at least one conversation with Mr. Robinson, prior to the time the trouble came, or the claim was [238] made? A. Yes.

Q. In any of those conversations, telephone or otherwise, or in any correspondence with Pittsburgh Testing Laboratory, did you have occasion to speak of or mention to Pittsburgh, either Mr. Clark or Mr. Robinson, this great price differential we have discussed, this great price differential between the Isaacson quotation and the Foundry quotation?

A. No. I had no occasion to talk to them about it.

Q. You did not discuss it with them?

A. No, I did not discuss with them the——

Q. (Interposing): Why not?

A. In trade it is a matter of principle that one does not disclose the information about price to an independent party who has nothing to do with the price. In other words, it is not good to publicize quotations of your suppliers if it is not strictly necessary to do so.

(Testimony of Cyril Gregory Gips.)

Q. Excuse me. Are you finished?

A. Yes.

Q. In connection—I am not speaking specifically of the price itself—I am speaking more specifically of the price differential. We have [239] talked about a differential between Isaacson's price and the Foundry price of approximately \$35.00—

A. (Interposing): Yes.

Q. (Continuing): —per ton, and you testified earlier today about these telephone conversations that took place between you and Mr. Clark before you sent the letter up here to Mr. Schlaugh telling him to confirm the Foundry offer; correct?

A. Excuse me.

Q. That is a very long involved sentence and I will withdraw it.

The Court: Do you withdraw it?

Mr. Gantt: Yes, your Honor, I think that was beyond pale. I will rephrase it this way.

A. Yes.

Q. (By Mr. Gantt): You have testified when you made at least one, and perhaps two, telephone calls to Mr. Clark at Pittsburgh Testing Laboratory it was prior to or on May 15th?

A. Yes; quite.

Q. And you, I believe, testified that you called him on—either on or prior—to May 15th to inquire whether Pittsburgh could do an inspection of this product? [240]

A. Yes.

Q. And I believe you testified that you mentioned that Seattle Foundry—you were considering

(Testimony of Cyril Gregory Gips.)

Seattle Foundry? A. That is correct.

Q. In that telephone conversation you did not discuss this price differential between Isaacson and Foundry? A. No.

Q. Did you discuss Isaacson Iron Works' offer at all?

A. No, we did not. It wouldn't enter the picture inasmuch as we—if we would place the business with Isaacson we would not have employed Pittsburgh Testing Laboratory. In other words, they were only concerned in the matter if at all we put the order in to Seattle Foundry; then Pittsburgh Testing automatically would have come in.

Q. Now, at the time of this first telephone conversation with Mr. Clark, which you have placed some time between the 12th or 13th of May and the 15th of May—is that correct? A. Yes.

Q. At the time of that first conversation with Mr. Clark of Pittsburgh did you have your [241] file before you on your desk? A. Yes.

Q. Were you at your own desk when you called? A. Yes.

Q. In that file you had the various letters from Mr. Schlaugh and the letters from the Washington, D. C., office? A. That is right.

Q. And your replies to those letters, or answers to those letters, copies of which you had written to both your Washington office and your Seattle office? A. Yes.

Q. And did you also have this letter of May 8th in your file? A. Yes.

(Testimony of Cyril Gregory Gips.)

Q. That is Exhibit 9? A. Yes.

Q. Which was the first reference you have had—you had had to an offer of Foundry?

Mr. Morrow: I object to this question as being repetitious. Mr. Gantt has established it has been in the file four or five different questions.

The Court: You may proceed. I think [242] it is covered.

Q. (By Mr. Gantt, continuing): In your first conversation with Mr. Clark did you have occasion to refer to that particular letter, Exhibit 9?

A. I may have, but only insofar as the specifications were concerned; not price.

Q. Well——

A. (Interposing): I mean parts of it, yes.

Q. Did you have occasion to refer to the part that says these are cast steel billets from sand molds?

A. I may have, yes, but I testified also I am not sure. I do remember having read to Mr. Clark the specifications of the original inquiry but I do not remember if I also read him this letter complete leaving out the price and the additional cost to bring it to F.A.S. value which would be of no concern to him. I do not remember, in the first place, having read him this letter or any part of it. I do not remember if I read this part as well.

Q. But you may have?

A. I may have, yes, sir; I cannot be sure.

Q. Then is it true that at the time you talked to Mr. Clark on May 15th, or in the first [243]

(Testimony of Cyril Gregory Gips.)

conversation between the 12th and 15th, that you knew that these billets were to be cast steel billets from sand molds?

A. I beg your pardon, I didn't.

Q. The file indicated it.

A. I am sorry. The only thing I knew was steel billets, according to these specifications. That is what we sold and we had ordered. I mean, I have no occasion—I mean, I am not a steel expert.

Q. I understand that, but you had read, Mr. Schlaugh's letters? A. Yes.

Q. And you testified you may have referred to that portion about these billets or cast steel from sand molds to Mr. Clark? A. Yes.

Q. You don't know whether you did or not but you may have? A. I may have.

Q. Now, didn't Mr. Clark tell you in these telephone conversations that took place before or on May 15th that ASTM specification A-17/29 required rolled or forged billets? A. No. [244]

Q. Your answer was? A. No.

Q. Didn't Mr. Clark tell you that the Foundry could not produce rolled or forged billets?

A. No, he did not.

Q. Didn't Mr. Clark tell you that the Foundry could produce only cast billets? A. No.

Q. Didn't you tell Mr. Clark that cast billets was what was ordered? A. No, I did not.

Q. Did you tell Mr. Clark that the Foundry said they were going to furnish cast billets?

A. Excuse me, could you repeat that question?

(Testimony of Cyril Gregory Gips.)

Mr. Gantt: Will the Reporter read the question?

The Court: The Reporter will read the question.

(Whereupon, the following was read by the reporter: "Q. Did you tell Mr. Clark that the Foundry said they were going to furnish cast billets?")

A. I did not state it out of my own. If you are referring to the last paragraph of this exhibit, [245] where there is a possibility I may or may not have read to him, that is the only thing I would have mentioned to him about it.

Q. (By Mr. Gantt): O.K.; did Mr. Clark tell you that Pittsburgh Testing could inspect the billets produced by Foundry only for the chemical requirements of ASTM 17/29, for visual or surface defects, and for size?

(Whereupon, there was a brief pause.)

The Court: Excuse me, do you want the question again?

A. Well, I am bothered with one thing: Is that the complete specification you are stating now?

Q. (By Mr. Gantt): No, I am not stating the complete specification. It is about four pages long and very small type.

A. Well, the——

Q. (Interposing): The letters I have used, ASTM 17/29, is the specification referred to.

A. And the actions you described completely what is to be done according to that specification?

Q. Not necessarily; no.

(Testimony of Cyril Gregory Gips.)

A. Well, then, the answer is no. [246]

Q. In your second telephone conversation with Mr. Clark, which I believe you placed May 15th or May 16th—which was it, do you recall?

A. Well, I would not recall exactly what the second conversation was. There may have been two or three conversations in all where I called him and he may have called me back and I may have called him again between the Monday and the day we placed the business, which was Thursday, the 15th. Therefore, when you refer to the second one, I am not sure what you are referring to.

Q. Well, my understanding of your testimony this morning was——

Mr. Gantt: Perhaps the Reporter can withdraw that prior question.

The Court: The last question?

Mr. Gantt: Yes, your Honor.

The Court: It may be withdrawn.

Q. (By Mr. Gantt, continuing): In your testimony this morning you testified that you had your first conversation between Monday and Friday, which, I believe, was the 12th and the 15th?

A. Yes.

Q. With Mr. Clark? [247] A. Yes.

Q. And that was in the nature of a preliminary inquiry? A. That is right.

Q. As to whether they had an office and whether they could inspect the product?

Pardon me, did you say Monday and Friday?

A. Monday and Thursday.

(Testimony of Cyril Gregory Gips.)

Q. Monday and Thursday is more correct. Then you testified you had a subsequent telephone conversation with him at or about the time that you confirmed your offer to Seattle?

A. That is right.

Q. Your Seattle office to make a firm order with Seattle Foundry; correct? A. Yes.

Q. Now, did this subsequent call take place before you confirmed the order to Seattle Foundry?

A. Yes. Excuse me; that is the call in which we accepted the offer of Pittsburgh Laboratory to do the inspection verbally over the phone?

Q. Yes.

A. It took place before I sent my wire out to Seattle confirming that we accepted the [248] Seattle Foundry offer.

Q. And in that telephone conversation didn't Mr. Clark tell you that Pittsburgh could and would inspect only for the chemical requirements of specification A-17/29 and the visual and surface defects and for size?

A. Is that the complete specification?

Q. No, that is not the complete specification.

A. Then the answer is no.

Q. The answer is no?

A. Could you repeat the question in that case?

The Court: The Reporter will read the question.

(Whereupon, the following was read by the Reporter: "Q. And in that telephone conversation didn't Mr. Clark tell you that Pitts-

(Testimony of Cyril Gregory Gips.)

burgh could and would inspect only for the chemical requirements of specification A-17/29 and the visual and surface defects and for size?")

A. The answer is no. He didn't state that, as such.

Mr. Gantt: Thank you. [249]

Q. (By Mr. Gantt): Now, did you tell either Mr. Clark or Mr. Robinson in these conversations you have related this morning in your testimony, prior to your letters of May 20th and 21st, 1952—did you tell either Mr. Clark or Mr. Robinson whether you knew anything about steel, or steel products, or steel billets?

A. I told them that at the initial contact with Mr. Clark and I repeated that during the visit of Mr. Robinson that we—that our company was—were general merchants and were no experts on any particular commodity and that——

Q. (Interposing): Well, excuse me just a moment. My question was: Did you tell them this, and I think you can answer that yes or no.

A. Can you repeat the question?

Mr. Gantt: Will the Reporter read the question?

The Court: The Reporter will read the question.

(Whereupon, the following was read by the Reporter: "Q. Now, did you tell either Mr. Clark or Mr. Robinson in these conversations you have [250] related this morning in your testimony, prior to your letters of May 20th

(Testimony of Cyril Gregory Gips.)

and 21st, 1952—did you tell either Mr. Clark or Mr. Robinson whether you knew anything about steel, or steel products, or steel billets?’’)

A. (Continuing): No, I did not tell them that I knew anything about steel, if that answers the question.

Q. (By Mr. Gantt): Yes; now, did you tell either Mr. Clark or Mr. Robinson in these conversations that took place prior to May 20th, or your letter of May 20, 1952, that you wanted Pittsburgh Testing Laboratory to accept the billets on behalf of Grace and Company?

A. Accept? No. I told them inspect and certify as to quality.

Q. I see.

A. On behalf of Grace and Company.

Mr. Gantt: Your Honor, have any of these depositions been published?

The Court: I don't believe so. I don't recall whether we did in pretrial or not.

Mr. Morrow: There is no objection.

Mr. Gantt: Well, I don't think anybody [251] has. They are here in the files.

The Court: You may, if you wish.

Mr. Gantt: I would like this one of Mr. Gips published.

Q. (By Mr. Gantt): In that connection, Mr. Gips, at your deposition in San Francisco on August 13, 1954, were you asked the following questions?

(Testimony of Cyril Gregory Gips.)

Mr. Morrow: May I have the page, please?

Mr. Gantt: At page thirteen.

Q. (By Mr. Gantt, continuing): "Whom did you contact at Pittsburgh Testing Laboratory?"

Were you asked that question? A. Yes.

Q. And did you answer:

"The initial contact was on the 'phone, which, I believe, the conversation on the part of Pittsburgh was by Mr. Clark. However, it was to introduce the subject and afterwards Mr. Robinson visited Grace and Company's office to become acquainted with us and at which time I requested him to advise me if his company was able and willing to take upon themselves to inspect the material which we were ordering [252] from the Seattle Foundry."

Was that your answer?

A. That is right.

Q. Now, I believe you testified, with regards to a discussion you had with Mr. Clark at Pittsburgh in San Francisco on May 20th—a telephone conversation?

A. Yes?

Q. I believe that you stated that the information you received in that telephone conversation on May 20th was related—was relayed on to Mr. Schlaugh in Washington on May 22nd, which is Plaintiff's Exhibit 25. I wonder if you have any independent recollection of what was said in your telephone conversation of May 20th with Mr. Clark of Pittsburgh?

A. I called him for the purpose of obtaining his

(Testimony of Cyril Gregory Gips.)

answer to the questions posed me by our Seattle office's letter and a copy of the Foundry letter which was attached, and I told them that apparently neither the Foundry nor Pittsburgh Testing Laboratory had any specification available the way it was ordered and I asked him about it and he said he would furnish that specification to his office and the matter of the technical inquiries in the letter from [253] the Foundry—I think he did not give me the answer right there. He called me back on it to give me the answers to that, the point being that they had to look it up.

Q. And was this telephone call on May 20th?

A. It may have been on the 21st; that I am not sure about, but it was upon receipt of the letter which was on the 20th.

Q. Prior to your letter of May 20th, which is Exhibit 21 in this case, your contact with Pittsburgh consisted primarily of your telephone conversations to Mr. Clark, hadn't they?

A. That is correct.

Q. And I believe your testimony is the only time you talked to Mr. Robinson is when he came to your office?

A. Yes; he came to meet us face to face.

Q. And that was sort of a social call, was it?

A. Well, social call—he liked to meet the people he was doing business with and we appreciated that in return and we just discussed the business in general. We didn't go into details of rates or charges or what not. I remember specifically showing him

(Testimony of Cyril Gregory Gips.)

the inquiry letter from our Washington office, original inquiry letter, and then we didn't go [254] into particular details. I do remember taking him in one moment to see Mr. Mahoney, vice president in charge, and just meeting him and he expressed himself at that time that he was glad to do business with us and we were glad to do business with him.

Q. But your letter of May 20th, which is Exhibit 21, states:

“* * * confirms a conversation between your Mr. Parker M. Robinson and our Mr. Gips.”

A. Yes, that is correct.

Q. Did you keep any notes of your telephone conversations; any sort of a journal or notebook?

A. I generally do.

Q. Did you keep it at this time?

A. I did keep such a book, yes.

Q. Where is it?

A. That, unfortunately, I do not know. At the time that the first claim was filed it was then a year later and I could not find the book.

Q. So that your reference to these telephone conversations might be off one or more days?

A. Well, there are some notes on some of the letters which were in my file at that time. This morning I read one of them. I think the letter you were just referring to, which was on a matter [255] of chipping.

Q. Yes?

A. There was one of the notes I wrote on there, but that is not complete. We use a book. Each year

(Testimony of Cyril Gregory Gips.)

we get a new one from the company and we note in there people that visit you, or prices quoted over the 'phone, appointments in the future, and so on.

Q. I understand; you don't have that now?

A. I don't have that book.

Q. Now, with regard to Exhibit 34, which is a letter that you wrote to the Seattle office of Grace, dated July 22nd, the first part, you have testified, concerns the high manganese content in one of the heats of the Foundry—eight billets? A. Yes.

Q. And you stated that you told Mr. Schlaugh you would accept the billets anyway but you wouldn't allow any exceptions in the future?

A. Yes.

Q. There is a statement in the second paragraph of your letter to the effect that:

“That specification is absolutely normal and should give no difficulties whatsoever to any Foundry.” A. Yes? [256]

Q. Now, did you write that?

A. I wrote the letter, yes.

Q. Is that your information?

A. No, that is the—I would hardly know that, having no steel knowledge but that was told me by Mr. Clark.

Q. That again came from Mr. Clark?

A. Yes.

Q. Have you ever looked up the word “foundry” in a dictionary?

A. Frankly, no, I haven't.

Q. Now, did you in your San Francisco office,

(Testimony of Cyril Gregory Gips.)

and particularly you, Mr. Gips, receive reports from Pittsburgh Testing Laboratory?

A. Yes, we did.

Q. And did you receive those periodically?

A. Yes.

Q. And I want to hand you what has been marked——

Mr. Gantt: And this is admitted?

Mr. Morrow: Yes, that is in evidence.

Q. (By Mr. Gantt, continuing): ——in evidence as Exhibit 35. Will you state what those are?

A. Those are the certificates of the [257] Pittsburgh Testing Laboratory on the work that was being done against our order.

Q. And did they come to you? A. Yes.

Q. And were they again put in your file——

A. (Interposing): Yes.

Q. (Continuing): ——on this whole matter?

Did you read them as they came?

A. I read some of them. I didn't always read all of them, but it doesn't make much sense to me.

Q. Do you know that these reports make frequent reference to "casting" and "pouring" and "cast billets"?

A. I have seen mention of them in there; yes.

Q. Did you know that at the time?

A. I read it so that I must have.

Q. It must have come to your attention?

A. I must have read it; yes.

Q. Who else in Grace and Company got copies of this, if you know? Did your Seattle office?

(Testimony of Cyril Gregory Gips.)

A. If I remember well, I received them direct. It may have gone through our Seattle office but I don't think so. I think they were sent direct. [258]

Q. I don't see any receiving stamps on these. Your usual receiving stamp doesn't appear on these.

A. Then it may have been accompanied by a letter, or they may have been attached to the bills when the bills came in, but I think I received them separate.

Q. There is an indication on the last page of each report at the bottom of the page, "cc," which I take it stands for carbon copy, and the numeral "2," "W. R. Grace and Company," so that apparently two came to Grace and Company?

A. It is quite possible.

Q. You received both of them?

A. I would eventually unless it went through our Seattle office and they kept on, but it is unlikely. They would have sent both through.

Q. Upon receipt of any of these from Pittsburgh did you have occasion to discuss the contents of any of these with Mr. Clark or Mr. Robinson or anyone else of Pittsburgh? By "these," I am referring to the reports which are marked Exhibit 35.

A. I may have on this manganese content, or something like that, but I don't see that I have.

Q. You have no independent recollection [259] of it? A. No.

(Whereupon, there was a brief pause.)

(Testimony of Cyril Gregory Gips.)

Mr. Gantt: Excuse me just one moment, your Honor.

(Whereupon, there was a brief pause.)

Q. (By Mr. Gantt): You have testified this afternoon and this morning of Mr. Robinson dropping in to see you at Grace and Company?

A. Yes.

Q. I believe you testified that was some time after the 15th and prior to the 20th?

A. I would put it that date; yes.

Q. Some time between the 15th——

A. (Interposing): Some time between the 15th and the 20th.

Q. And I believe you also testified you took him in to see Mr. Mahoney? A. Yes.

Q. Now, was anyone else present when Mr. Robinson came to visit you at Grace?

A. Well, we work in a big hall. There were many people present but he didn't talk with anyone else to my knowledge but to myself. [260]

Q. He came up and introduced himself?

A. Yes.

Q. And then you, yourself, took him in to meet Mr. Mahoney? A. Yes.

Q. And Mr. Mahoney was alone? A. Yes.

Q. So that the only two people he would have talked to are Mr. Mahoney and yourself?

A. Yes.

Q. So that the only two people that would have known he was there would be Mr. Mahoney and

(Testimony of Cyril Gregory Gips.)

yourself, is that correct? A. Yes.

Q. I believe you said yesterday you didn't know the difference between a billet and an ingot?

A. That is correct.

Q. Do you know the difference now?

A. Quite frankly I wouldn't dare to give a description of it. I still don't, no.

Q. In the journal that you said you kept on your desk of notes as they occurred through the day and other occurrences, would you have had a reference to Mr. Robinson's visit to you that you have testified to? [261]

A. I don't really think I would, not to his visit, unless he gave some specific details. If he quoted me a rate or something I couldn't possibly remember. If it is merely a visit to meet somebody you leave your card and say "hello" and introduce yourself.

Q. But you don't jot that down?

A. You don't jot it down. If not something of importance I don't note those things down, no.

Mr. Gantt: That is all, your Honor.

However, I would like to state I understand Mr. Savage has requested that all witnesses be present until the second phase of the case.

The Court: Have you any questions, Mr.—

Mr. Savage (Interposing): Savage. If the Court please, the third party defendant, Seattle Foundry, waives any cross-examination of Mr. Gips insofar as the cause between Grace and Pittsburgh is concerned.

(Testimony of Cyril Gregory Gips.)

The Court: Do you have any redirect?

Mr. Morrow: Just very short.

The Court: All right.

Mr. Morrow: I would like this marked as a Plaintiff's exhibit. [262]

The Clerk: Plaintiff's Exhibit 68 marked.

(Plaintiff's Exhibit 68 marked.)

Mr. Morrow: I offer 68 in evidence as part of the records of Grace and Company.

Mr. Gantt: May we see it?

Mr. Savage: We have no objection.

Mr. Gantt: I just want to take a look at it.

(Whereupon, there was a brief pause.)

No objection, your Honor.

The Court: Exhibit 68 may be admitted.

(Plaintiff's Exhibit 68 admitted.)

The Court: Anything further, Mr. Morrow?

Mr. Morrow: Yes.

Redirect Examination

By Mr. Morrow:

Q. I would like to ask you, Mr. Gips, if this Plaintiff's Exhibit 28 is the letter you referred to as having been sent out to your Washington office on May 9, 1952, advising the Washington office that there might be a change in supplier. You may wait [263] just a moment to take a look at the letter.

(Whereupon, there was a brief pause.)

(Testimony of Cyril Gregory Gips.)

A. Excuse me. Yes, Mr. Morrow, that is the letter I was referring to.

Q. Referring you to Plaintiff's Exhibit 35, which is designated Reports of Pittsburgh Testing Laboratory, Mr. Gips, you testified that they came over your desk and you read some of them and also you indicated that they may be considered as a certificate of Pittsburgh Testing Laboratory in the trading business, export and import business. What use is made of a certificate of inspection?

A. There are various uses and various reasons why they are requested. One reason may be the way W. Grace and Company employed it, to insure that they were receiving the exact product that they had purchased and to have a responsible party stand in for it and certify that that is so. For consular purposes, some countries demand this.

Q. I think you have answered my question. What was the purpose of your providing that Pittsburgh make an inspection and make an inspection certificate, I think it is——

May I have 21, please?

(Whereupon, document was handed to [264] Counsel by the Clerk.)

——and deliver—I refer you to Exhibit 21, your letter to Pittsburgh of May 20th, Mr. Gips. It is 1952. You indicate there that you have requested them to make an inspection—to make inspection and deliver certificate of inspection for the following material.

(Testimony of Cyril Gregory Gips.)

What was the purpose of requiring a certificate of inspection?

A. So that—we had to do here with a supplier that we didn't know and we had to have a certificate. We were making delivery to a foreign government and we had to insure that we were getting the right merchandise and, therefore, we employed the Pittsburgh Testing Laboratory, who stated they were experts in this type of inspection, and making them responsible that this was the right material.

Q. Well, will you please state whether or not the purpose of the inspection certificate was to be used in any manner by Grace and Company in the event of any future claim with respect to the goods?

A. It was made for that sole purpose. Our client didn't demand it. It was for the protection of Grace itself that we demanded that there be a responsible expert present who guarantees the right [265] merchandise to be delivered.

Mr. Gantt: I object to the answer as not responsive, your Honor.

Mr. Morrow: I am willing to have that part stricken which is not, your Honor.

The Court: Do you wish the unresponsive part of that stricken?

Mr. Gantt: Yes, your Honor.

Q. (By Mr. Morrow): Mr. Gips, in your business of exporting and importing does the customer demand a certificate of inspection on occasions?

A. On occasions he will.

Q. Is that one of the purposes in this case for

(Testimony of Cyril Gregory Gips.)

requesting a certificate of inspection, in the event such was required by the customer in New Zealand?

A. No, it was not requested and it was solely done for the purpose of the protection of W. Grace and Company, that they would receive merchandise in compliance with the order that the foreign government had placed in their care.

Q. Well, what I want to get at—does the certificate—first of all, generally, is it obtained by an exporter and importer against the contingency [266] that later on the customer may require a certificate of inspection?

A. Well, it may be used for that—for that purpose. In other words, to disclaim responsibility; but the point is, if the client has not stated that such a certificate shall be final, or regarded as final, then it can not be used. In this case if the New Zealand Government had come in and said, “You will also furnish us with a certificate of inspection by the Pittsburgh Testing Laboratory and that that shall be final,” in other words, that constitutes that once tested by Pittsburgh we wouldn’t have any more responsibility, then at that moment the responsibility goes back to the inspector.

Q. Now, assume in this case that the material sold by Grace and Company to the New Zealand Government Trade Commissioner had complied with the New Zealand Government Trade Commissioner’s order, what purpose would the certificate then serve in the event that the New Zealand Gov-

(Testimony of Cyril Gregory Gips.)

ernment Trade Commissioner made a claim which was, say, unfounded?

Mr. Gantt: I will object to that, your Honor.

The Court: I don't think it is material. [267]

I have a pretrial hearing starting at 4:30. I want to inquire——

Mr. Morrow (Interposing): That is my last question.

Mr. Gantt: I have no further questions at this time.

The Court: That concludes it. Now, Mr. Gips, do you want to be excused for the next day or two?

Mr. Morrow: Well, I would rather leave it this way: That he may be excused and we will guarantee that he be reproduced in the event he is required.

The Court: Is that satisfactory?

Mr. Savage: Yes.

The Court: All right. Then that is all.

Mr. Gantt: Well, just one point there. You say you will guarantee he will be back?

Mr. Morrow: For Mr. Savage, if he wants him. Do you want him?

Mr. Gantt: It is possible.

Mr. Morrow: If either party wants, you will come back, Mr. Gips?

The Witness: Yes.

The Court: If he is excused then it is [268] by agreement among yourselves?

Mr. Gantt: And he will be available on what kind of notice?

(Testimony of Cyril Gregory Gips.)

Mr. Morrow: Well, reasonable. He can fly up in a day.

The Court: Well then, you be available to appear within twenty-four hours' notice.

The Witness: Within twenty-four hours' notice.

Mr. Gantt: I think that is satisfactory.

The Court: This case is recessed until tomorrow morning at 10 o'clock.

How do you anticipate your time is running?

Mr. Morrow: I feel I am fairly on schedule. We didn't get started until noon.

The Court: I understand that. How much more time?

Mr. Morrow: I think under the circumstances we should finish tomorrow.

The Court: And you will be prepared to go ahead tomorrow, Mr. Gantt?

Mr. Gantt: Will I be?

The Court: If we get to you, will you be prepared to go ahead? [269]

Mr. Gantt: Yes, your Honor.

(Witness excused.)

(Whereupon, at 4:35 o'clock p.m., November 30, 1955, a recess was had in the within-entitled and numbered cause until 10 o'clock a.m., December 1, 1955.) [270]

WILLIAM H. SCHLAUGH

upon being called as a witness for and on behalf of the Plaintiff, and upon being first duly sworn, testified as follows:

The Clerk: Will you state your full name and spell your last name, please?

The Witness: William H. Schlaugh, S-c-h-l-a-u-g-h (spelling). [275]

* * *

Direct Examination

By Mr. Morrow:

Q. Mr. Schlaugh, have you been sworn?

A. Yes, I have.

Q. Will you please state your full name?

A. William Herman Schlaugh.

Q. And what is your home address?

A. 209 Northwest 23rd Avenue, Portland.

Q. And what is your business address in Portland?

A. 614 Board of Trade Building.

Q. By whom are you employed? [277]

A. Grace and Company, Pacific Coast.

Q. What is your present position with the Grace and Company?

A. Manager of the lumber division of the Northwest.

Q. What are your duties as manager of the lumber division?

A. Procuring and purchasing lumber for the account of Grace and Company.

(Testimony of William H. Schlaugh.)

Q. And what is the nature of the business of Grace and Company?

A. Of the lumber?

Q. Yes.

A. We export lumber from the Pacific Coast to foreign countries, Peru and Australia, South Africa, Panama, and other countries, and we also ship lumber by water and rail to the Atlantic Coast seaboard.

Q. What roll to you play in that business?

A. I purchase all of the lumber which is shipped for our account to these various destinations.

Q. What was your job in 1952?

A. In 1952 I was in the export-import department of Grace and Company, Seattle. [278]

Q. And what was your residence at that time?

A. 2511 East 135th Avenue, Seattle.

Q. And when did you move to Portland?

A. September 1, 1955.

Q. What were the duties of your occupation in April through September, 1952?

A. My duties were handling the various inquiries which we received from our San Francisco office. In other words, our San Francisco office was selling the various products and we were acting as buying agent for them and my job was procuring-locating supplies and we got the business in actually purchasing the different commodities which we exported.

Q. When did you start to work for the Grace Company?

A. January, 1948.

(Testimony of William H. Schlaugh.)

Q. And in what capacity?

A. In the billing department, freight traffic department.

Q. How long were you so employed?

A. Until—in that position?

Q. Yes. A. Until October, 1948. [279]

Q. And then what position did you take?

A. Then I was taken in commerce as a trainee in the export-import department.

Q. Who was the manager of the Seattle office during your employment in Seattle?

A. From January, 1948, until February 1, 1955, Mr. W. D. Vanderbilt was northwest manager for Grace.

Q. Mr. Vanderbilt then retired, did he?

A. That is correct.

Q. When did you enter the export and import department of the company?

A. In October of 1948.

Q. Had you any previous experience prior to that time in exporting and importing?

A. No.

Q. Or the purchase or sale of commodities?

A. No.

Q. Just what was your experience in exporting and importing while you were with Grace and Company? A. During what period?

Q. During the period from 1948 until the spring of 1952?

A. Well, we—do you want to know the [280] different commodities that I handled?

(Testimony of William H. Schlaugh.)

Q. Yes; just what you did.

A. Well, as an example our San Francisco office would forward us inquiries by letter or by teletype asking us to offer on—lumber was the main item which I handled up here but in addition to lumber there would be wheat and flour and sometimes pulp and canned salmon, oats, and then many miscellaneous items which you may only see once.

Q. Following receipt of the inquiries from San Francisco what were your duties?

A. My duties were to locate a possible supplier or suppliers for that commodity at the lowest possible price and then ship them on to San Francisco.

Q. Did you deal in any steel products prior to May or April, 1952? A. No, I did not.

Q. I mean you personally? A. No.

Q. Had you any experience in the manufacture, yourself personally, of course, of steel or steel products prior to April, 1952? A. No.

Q. Had you any technical knowledge of [281] either the sale or manufacture of steel products prior to that time? A. No.

Q. Had you any experience or knowledge concerning the requirements of specifications going to make up products of steel? A. No.

Q. Were you in April and May familiar with the American Society for Testing Materials standards?

A. I will answer that yes and qualify it by saying on lumber only.

Q. On lumber only?

(Testimony of William H. Schlaugh.)

A. In that we had purchased in the past poles and pilings under certain ASTM specifications.

Q. Had you any knowledge or information concerning the requirements, specifically of the ASTM A-17/29 specifications for steel forgings and billets and slabs? A. No.

Q. Referring you to Plaintiff's Exhibit 2, Mr. Schlaugh, I will ask you if you received this, if this exhibit came to your attention?

A. Yes, it did.

Q. In the Seattle office; and when did it [282] come to your attention?

A. On April 21, 1952.

Q. And what did you do in connection with that?

A. I wrote letters to various possible suppliers which are listed on this paper.

Q. And can you just run them off?

A. Western Steel, Pacific Car and Foundry, N and S, Seattle Foundry, Seidelhuber, and Isaacson.

Q. How did you——

The Court (Interposing): Are those—excuse me, are those listed on here?

The Witness: In my pencil marks.

Q. (By Mr. Morrow, continuing): How did you determine to whom you would send out inquiries to supply this material?

A. In this exhibit San Francisco stated that according to their information the firms of Isaacson and/or Seidelhuber might be in a position to offer so that I obtained those two firm's names from the San Francisco letter, and then I went to

(Testimony of William H. Schlaugh.)

the classified section in the 'phone book under foundries and found the other names there. [283]

Q. Now, referring you to Plaintiff's Exhibit 3, would you indicate whether those are inquiries which you sent out pursuant to the San Francisco request for quotations on steel billets?

A. Yes, they are.

Q. And in particular with reference to Isaacson and Seattle Foundry, are those ones which you sent out? A. Yes.

Q. Now, it is indicated that there was an attachment of specifications to those inquiries. Do you recall whether there was such an attachment to each of the inquiries? A. Yes, there was.

Mr. Morrow: Exhibit 4?

(Whereupon, document was handed to Counsel by the Clerk.)

Q. (By Mr. Morrow): Now, referring you to the Exhibit 4, Mr. Schlaugh, which is a letter admitted in evidence of May 1, 1952, which indicates an additional copy of your inquiry covering steel billets for Central America. It was enclosed to Seattle Foundry. I will ask you to take a look at the enclosure and indicate whether or not those are the specifications [284] that were sent with the original letter of inquiry to Seattle Foundry?

A. Yes, they were.

Q. This enclosure attachment to Plaintiff's Exhibit 4 indicates that it is on a mimeographed copy;

(Testimony of William H. Schlaugh.)

is that correct? A. Ditto, yes.

Q. Had you made up a number of specifications of similar type? A. Yes.

Q. And can you say whether or not the enclosures with your letters of inquiry to Isaacson and to Seattle Foundry were identical with the attachment to Plaintiff's Exhibit 4?

A. They were identical.

Q. Now, referring you to Plaintiff's Exhibit 5, which has been admitted in evidence, and which transmits information to San Francisco, I will ask you if that is your signature?

A. Yes, it is.

Q. It is indicated therein, Mr. Schlaugh, that you made reference to an Isaacson quotation, to a Seidelhuber quotation, and to a Seattle Foundry working on the order. Do you recall how you got the information from Isaacson in this [285] instance?

A. I obtained the information from Isaacson from a telephone conversation.

Q. And in connection with Seidelhuber, do you recall off hand how you received that information?

A. I received that in a telephone conversation.

Q. And in connection with Seattle Foundry?

A. That also.

Q. And referring you to Plaintiff's Exhibit 6, which is a formal proposal, or, rather a written proposal, admitted in evidence, from the Isaacson Iron Works, did that come to your attention?

A. Yes, it did.

Q. Can you state whether or not the Isaacson written proposal conformed to the previous infor-

(Testimony of William H. Schlaugh.)

mation you had received by telephone in connection with the Isaacson quotation? A. Yes, it did.

Q. And referring you to Plaintiff's Exhibit 7, which has been admitted in evidence, it appears to be an offer of the Seattle Foundry Company. Will you state whether that came to your attention?

A. Yes, it did. [286]

Q. And in connection with that offer, Mr. Schlaugh, did you advise your San Francisco office concerning the Seattle Foundry Company's offer?

A. Yes.

Q. And is that information conveyed to San Francisco contained in Plaintiff's Exhibit 9?

A. Yes.

Q. Is that your signature on Plaintiff's Exhibit 9? A. Yes.

Q. Referring you to Plaintiff's Exhibit 10, Mr. Schlaugh, which is an exhibit admitted in evidence, appearing to have been written on May 9, 1952, by Mr. Gips of your San Francisco office to the Seattle office and received in the Seattle office May 12, 1952, can you state whether or not that letter came to your attention? A. Yes, it did.

Q. What did you do in connection with that letter, if anything?

A. I telephoned Seattle Foundry, Mr. Jim Murphy, and asked him to make sure that his quotation was correct. That is, the specification whether he was quoting ASTM specification 17/29 and that the prices he quoted me were correct. [287]

Q. Did you keep any record of telephone con-

(Testimony of William H. Schlaugh.)

versations—— A. (Interposing): Yes.

Q. (Continuing): in your office?

Referring you to your export journal, and page 58, the export journal having been admitted in evidence, can you by reference thereto confirm the fact, or can you not, either way, that you talked to Mr. Murphy on about May 12, 1952?

The Court: What is that exhibit number?

Mr. Morrow: I am sorry. That is——

The Clerk (Interposing): 55.

Mr. Morrow: 55, no, that is 56.

The Witness: 54.

Mr. Morrow: 54.

The Court: It is marked export journal in the pretrial order.

Mr. Morrow: Yes, that is quite correct. Exhibit 55 is the——

The Witness (Interposing): It shows 54 here, Mr. Morrow.

Mr. Morrow: 54?

The Witness: Yes.

The Court: On the pretrial order it is 54. I just wanted to get the number. [288]

Mr. Morrow: We got this straightened out.

The Court: The Reporter will read the question.

Mr. Morrow: I will repeat it.

The Court: Will you rephrase it?

Mr. Morrow: Yes.

Q. (By Mr. Morrow, continuing): With reference to your journal, Plaintiff's Exhibit 54, can you

(Testimony of William H. Schlaugh.)

establish when you talked to Mr. Murphy in connection with Plaintiff's Exhibit 27?

A. Yes. My journal showed that I had a telephone conversation with Mr. Murphy on May 12th.

Q. Does the journal indicate that—to what the conversation was in reference to?

A. Well, it was in reference to the steel billet inquiry.

Q. What page is that on? A. Page 58.

Q. Would you just read what your notes are in reference to that particular matter?

A. I have down here:

“Seattle Foundry, Jim Murphy, item two, [289] \$130.00 per two thousand pounds f.o.b plant.”

Then there is the word “Truck.” Then the next line is:

“Thought was chrome nickel steel.”

The Court: Read that again.

The Witness: “Thought was chrome nickel steel Is low carbon steel.”

Q. (By Mr. Morrow): Now, is that all?

A. There is some more which had to do with this conversation.

Q. Yes; well, go right ahead.

A. “Type A.” Do you want me to read on?

Q. Yes.

A. “Type A—Manganese .50/.80; phos. .04 max.; sulphur .05 max.; carbon” and then “type” with a line crossed over it and “Grade 2 .15/.25 item 2 carbon .05/.15.”

(Testimony of William H. Schlaugh.)

And then I have written down one more further thing on the page:

“Jim Murphy,” and under that I have, “\$3.00 per ton to load on a car.”

Q. Is that all of your entries in connection with that?

A. “Shunting car,” and something else there. That is all. [290]

Q. Mr. Schlaugh, you said that you indicated that you called Mr. Murphy. Now, in particular reference to Plaintiff’s Exhibit 10, that is a letter of May 12th from your San Francisco office, what did you do or what was the subject of your conversation between yourself and Mr. Murphy on that occasion?

A. As I said previously, I immediately telephoned him because of San Francisco’s letter. That would be the only reason I would telephone him.

Q. What did Mr. Murphy—what was his answer or reply?

A. He gave me assurance that the order he was quoting was on steel billets per ASTM specification so-and-so, and he also went over his prices to make sure that his prices quoted were correct.

Q. Now, do you recall whether or not you made any reply to your San Francisco office?

A. Yes, on the letter received there is a place for us to—we state whether we answered it or not and if it is by letter we just put the date and if it is by teletype we write down teletype and the date

(Testimony of William H. Schlaugh.)

and I have shown on this letter that I answered it by teletype on May 12th. [291]

Q. Referring you to Plaintiff's Exhibit 13 can you state what that is in reference to your request by the San Francisco office?

A. Well, this is a teletype which the Seattle office sent to the San Francisco office on May 12th.

Q. Yes; can you state whether or not there is any reference in your teletype, or can you state how the letter—that is Plaintiff's Exhibit 10?

A. 10.

Q. —10 is connected up with Plaintiff's Exhibit—this teletype—

A. 13.

Q. —13?

A. Plaintiff's Exhibit 10 is a letter from San Francisco and has a number, letter number, 9586. In my teletype, on our teletype, to San Francisco I referred to that letter 9586.

Q. Now, did you personally send out this teletype?

A. Yes, I did.

Mr. Morrow: I would like to have the Court read the——

The Court (Interposing): Have I seen that once?

Mr. Morrow: I think so. [292]

A. (Continuing): I think I should add this: You asked me if I personally sent it out. I did. Before——

Q. (By Mr. Morrow, interposing): Yes?

A. (Continuing): sending it out I was still working under Mr. Vanderbilt and I showed him a

(Testimony of William H. Schlaugh.)

rough copy of the teletype first and he approved it.

Q. Was this teletype, May 12th, 12:02 p.m., sent out prior to or after your conversation with Mr. Murphy? A. After.

Q. How long after?

A. I would say immediately or when the next teletype message was scheduled for San Francisco.

Q. Now, referring you to Plaintiff's Exhibit 12, which has been admitted in evidence, asking for an explanation of substantial differences in price, did that come to your attention? A. Yes.

Q. And was there a reply to that?

A. This message came in on the exact same wire at the same time which we had sent our reply.

Q. Referring to Plaintiff's Exhibit 13?

A. That is correct. They are referring to [293] their 9586, which is Plaintiff's Exhibit 10. Since we had told them, in Plaintiff's Exhibit 13, that the quotation 3234 was in order we did not make any additional reply.

Q. Now, can you state whether or not—or when you had—if so, when you had—any information from your San Francisco office in connection with the placing of the business with Seattle Foundry?

I will refer you to the lumber journal in order that you might refresh your recollection.

The Court: Do you have the question in mind?

The Witness: Yes.

A. That is when I first knew that Grace had received the order?

Q. (By Mr. Morrow): Yes, to place the order

(Testimony of William H. Schlaugh.)

—information to place the order. Had you received prior information that Grace was about to receive the order from the New Zealand Government Trade Commissioner?

The Court: I think you better strike those two questions and rephrase it. It is kind of vague.

Mr. Morrow: All right. We will start all over again. [294]

Q. (By Mr. Morrow, continuing): First of all, I will refer you to transactions on the 9th, including a number of exchanges of telegraphs between your different offices, being Plaintiff's Exhibit 66, and I will ask you if you can state what the circumstances of this case were on May 9th? Did you specifically——

The Court (Interposing): Circumstances of the order?

Mr. Morrow: Pardon?

The Court: “* * * circumstances of this case.”

Q. (By Mr. Morrow, continuing): Well, particularly, did you receive any advice on May 9th in respect to the possibility of Grace receiving the order from the New Zealand Government Trade Commissioner?

A. No, there is nothing in these.

Q. Not in there? A. No.

Q. Now, in reference now to the information which you—any information you had from your San Francisco office in connection with the possibility of placing this offer, what did you have?

A. There are other teletypes. These aren't the ones. [295]

(Testimony of William H. Schlaugh.)

Q. I see.

A. I received another teletype. I believe it was requesting that I extend my offers from Seattle Foundry and Isaacson and in that teletype they said, “* * * except place the order soonest * * *,” but that teletype is not listed here.

Q. Isn't it in that group there?

A. I don't see it. These aren't asking for extensions on the offer.

The Court: Your first question was on May 9th, what knowledge he had about Grace placing or Grace receiving the order from New Zealand; is that correct, Mr. Morrow?

Mr. Morrow: That is correct. We are just backing up here a little bit.

Q. (By Mr. Morrow): Here is—well, I think I was right in the first place. If you will, refer to this export journal now and your entry there on page 58—not 58, page 61 of your export journal.

The Court: Export or lumber?

Mr. Morrow: It is the export journal. I am sorry I am so confusing to the Court and to the witness, your Honor, but I think I can get at this. [296]

Q. (By Mr. Morrow, continuing): Now, will you just disregard what I just told you?

A. Yes.

Q. Now, I will refer you to Plaintiff's Exhibit 15 and the wire there in connection with the steel billets. Did that wire—where did that wire originate?

A. From our San Francisco office.

Q. Did it come to your attention?

(Testimony of William H. Schlaugh.)

A. Yes, it did.

Q. Would you read the wire now so that I can have it in mind?

A. "Steel billets. Wire number 4. Confirm Seattle Foundry and Isaacson Iron Works. Extend validity offers. Reference your letters 3234 and 3208. This reply to your 16th, 5:00 p.m. Probably will place order soonest."

Q. Now, did you—or do you recall whether or not at about the same time you had a telephone conversation with Mr. Gips? I will refer you to page 61 of the export journal?

A. Yes. That telephone conversation is listed on page 61 of the export journal. That was my first telephone conversation I had had with Mr. [296-A] Gips on this transaction.

Q. Now, in connection with that entry, would you just read it, please?

A. "Steel billets." I had the name Gibbs but his name is Gips. "Mr. Gibbs, confirm acceptance Inspection—Pittsburgh Testing Laboratories. We sell F.A.S., Seattle 45/90 days, rating and license."

The word "indecent" is written in there.

Then down below:

"No excise tax."

Q. In reference to your telephone conversation with Mr. Gips and your teletype requesting you to confirm the acceptance of the Foundry, what did you do?

A. I immediately telephoned Seattle Foundry

(Testimony of William H. Schlaugh.)

and talked to Jim Murphy and placed the business with him.

Q. And did you advise your San Francisco office?

A. Yes; we confirmed that we had done so.

Q. And referring you to Plaintiff's Exhibit 18—yes—is that the confirmation wire?

A. It is.

Q. Sent out by you? A. Yes. [296-B]

Q. Now, during this period of time did Mr. Vanderbilt have anything to do with the placing of the contract with the Seattle Foundry?

A. No, he had no contact at that time—had had no contact with Seattle Foundry.

Q. Did he subsequently have something to do with the contract?

A. With the contract itself?

Q. Yes.

A. He signed the contract.

Q. He signed the contract? A. Yes.

Mr. Gantt: Objection, your Honor, if I may be permitted to object here, to the calling of this document, the exhibit here, a contract.

The Witness: No, it isn't.

Mr. Gantt: I think that was in his question. His question was: Did Mr. Vanderbilt sign the contract? I think it was in both the question and answer and I object to the question and move that the answer be stricken.

The Court: The Reporter will read the question and answer.

(Testimony of William H. Schlaugh.)

Mr. Morrow: I am perfectly willing that it be understood that—at this time that— [296-C] Plaintiff's Exhibit 20 and that anything the witness has said should not be construed as to an interpretation of the nature of the document, which is the sole purpose of the Court.

Mr. Gantt: I believe that the record should be changed there to show——

Mr. Morrow (Interposing): Very well.

Mr. Gant (Continuing): that it is Exhibit 20.

Mr. Morrow: I am willing that the questions and answers be stricken, your Honor.

The Court: It will be so ordered.

Q. (By Mr. Morrow): Showing you Plaintiff's Exhibit 20, Mr. Schlaugh, I will ask you if that is Mr. Vanderbilt's signature? A. Yes, it is.

Q. Who prepared that document?

A. I am not sure who prepared it. Mr. Vanderbilt's initials are shown below and it would appear that he prepared it; and, if I prepared it for his signature, ordinarily my initials would show below. I have the feeling I prepared it and showed it to him and he checked it over to see if it was in accordance with his also. [296-D]

Q. Now, are you familiar with Exhibit 20?

A. Yes.

Q. And is the subject matter of your discussions with Mr. Murphy in reference to the Foundry selling Grace and Company steel billets contained in that document, Exhibit 20? A. Yes.

Mr. Gantt: Objection, your Honor.

(Testimony of William H. Schlaugh.)

The Court: Objection sustained.

Mr. Gantt: And move that the answer be stricken, if he did answer.

The Court: The answer given was "yes" and it will be stricken.

Q. (By Mr. Morrow): Well, does the—does that instrument cover the subject matter of your offers received from the Foundry and your conversations with Mr. Murphy?

Mr. Gantt: Objection.

A. Yes.

Mr. Gantt: Objection, your Honor.

The Court: Objection sustained. I don't believe you can amplify that document in that fashion, Mr. Morrow.

Mr. Morrow: Very well. [296-E]

The Court: There is one question I wish to get straightened out here that may or may not have been covered by the order to strike. The question here to this witness, and I don't believe it was stricken, in substance was this:

Did Mr. Vanderbilt have anything to do with this transaction up to this time?

Does Counsel recall that question?

Mr. Morrow: Yes.

The Court: I believe the answer was, in effect, "no."

Mr. Morrow: The question was in reference to the contract and not in reference to any—

The Court (Interposing): Should we strike that question?

(Testimony of William H. Schlaugh.)

Mr. Morrow: It is agreeable that the question and answer be stricken.

Mr. Gantt: Fine.

The Court: And then if you wish to establish anything further——

Mr. Morrow (Interposing): I said I would start all over again, which I did.

Q. (By Mr. Morrow): Now, Mr. Schlaugh, referring you to [296-F] Plaintiff's Exhibit 23, which is a letter of May 16, 1952, from Mr. Murphy to the Grace and Company, did that come to your attention?

A. Yes.

Q. Now, what did you do in connection with that document?

A. I sent a copy of this letter to our San Francisco office.

Q. Had you in the meantime received Plaintiff's Exhibit 19 enclosing a purchase order from your San Francisco office? A. Yes, I had.

Mr. Morrow: Your Honor, just so that you know what we are talking about, Plaintiff's Exhibit 19 is a letter from Mr. Gips to Seattle enclosing the purchase order.

The Court: From Gips?

Mr. Morrow: From Gips to Seattle, enclosing the purchase order, and then advising that all instructions should be carried out, and so forth.

Q. (By Mr. Morrow): Now, in reference to the exhibit you have before you, Plaintiff's Exhibit 23, what did you do, Mr. Schlaugh? [296-G]

A. I sent a copy of this letter to San Francisco.

(Testimony of William H. Schlaugh.)

Q. That is a copy of the Seattle Foundry Company letter of May——

A. (Interposing): 16th.

Q. (Continuing): 16th? And you forwarded that under Plaintiff's Exhibit 24, did you, a letter of May 19th from you to San Francisco?

The Court: Exhibit what, Mr. Morrow? Exhibit number what?

Q. (By Mr. Morrow, Continuing): 24, isn't it?

A. Yes, 24. Yes, I did.

Q. Now, what other enclosure was there with that letter?

A. Also a signed copy of the purchase order, the inter-office purchase order.

Q. Can you identify that signed copy of the inter-office purchase order? A. Yes.

Q. And to which exhibit is it attached?

A. It is attached to Exhibit 19, Plaintiff's Exhibit 19.

Q. And it is identified, is it, by being the last copy of export department number 8881? [296-H]

A. Yes, 8881.

Q. 8881? A. Yes.

Q. And down at the bottom there are some initials attached. Whose initials are those?

A. Those are Mr. Vanderbilt's.

Q. Mr. Vanderbilt's? A. Yes.

Q. Now, I notice, Mr. Schlaugh, on this duplicate copy of the purchase order returned to San Francisco the marks and the words "packing" are stricken. A. Yes.

(Testimony of William H. Schlaugh.)

Q. Can you explain that?

A. Well, on this purchase order he has stated under packing that goods must be suitably packed for export shipment with case markings, weights and measurements clearly shown on at least two adjacent sides of all packages and the packages to be numbered consecutively. I struck this because I couldn't see how you were going to put pieces of steel—package them in cases and put all these marks on them and I did not feel it was necessary and I told Clarence that they were going to be shipped loose. [296-I]

Q. Very well; now, in reference to your enclosing and forwarding Seattle Foundry's letter of May 16th to the San Francisco office, can you state whether or not you had any telephone conversations with anybody during that period, or in reference to this matter contained in the letter and particularly in reference to advice—you advised your San Francisco office that:

“Seattle Foundry contacted Pittsburgh Testing Laboratory, Seattle, who did not have a copy of ASTM A-17/29. We would like to have you confirm that this specification has the composition listed in Seattle Foundry Company's letter.”

Where did you get that information?

A. From a telephone conversation.

Q. Do you have a record of that conversation?

A. Yes, I do.

The Court: Mr. Morrow, you just read in part from what exhibit?

(Testimony of William H. Schlaugh.)

Mr. Morrow: Exhibit 24.

Q. (By Mr. Morrow): Where is your record of that?

A. On page 43 of the lumber journal.

Q. And that is Exhibit? [296-J]

A. Exhibit 64. No, excuse me, Plaintiff's Exhibit 55.

Q. And what does that note say?

A. I show a conversation with Jim Murphy where I stated testing was for our account and I have written down, "Pittsburgh Testing have no spec."

Q. I see; now, did you receive a reply to your letter of May 19th to your San Francisco office? That is Plaintiff's Exhibit 24, and is Plaintiff's Exhibit 25 the reply? A. Yes, it is.

Q. Now, what did you do in connection with this information which you received from your San Francisco office?

A. I called Seattle Foundry. I have written in my pencilled notes that I called and wrote Seattle Foundry. Apparently called them and passed the information on and confirmed it by letter, and I also note—have pencilled notes—and wrote Pittsburgh Testing Laboratory on the same date.

Q. Very well; showing you Plaintiff's Exhibit 26, is that the letter that you wrote Seattle Foundry conveying the information you had received from your San Francisco office? A. Yes, it is. [297]

Mr. Morrow: Your Honor, at this time I would like to read this particular letter.

(Testimony of William H. Schlaugh.)

“Seattle, U.S.A. May 23, 1952, Seattle Foundry Co., Inc., 3444 13th Ave. S. W., Seattle, Washington, Attention Mr. James W. Murphy. Gentlemen: Steel Billets, our order 8881. In reply to your letter of May 16th, we have no objection to your pouring both sizes flat, the taper being 4" on item 1 and 3" on item 2. Pittsburgh Testing Laboratory in San Francisco are supplying their Seattle office with the necessary information to inspect this material. The chemical requirements for this order are per ASTM A-17/29, as listed in your letter of May 16th, but one of the physical requirements is as follows:

“The depth of chipping must not exceed 1/16 per 1/8" of diminution up to a maximum of 3/4 of 1".”

“We hope you can find some meaning from this requirement and await your advices.

“Yours very truly,

“W. R. Grace and Company, W. H. Schlauch, Export Department.”

Q. (By Mr. Morrow): Now, you stated you also wrote to the Pittsburgh Testing Laboratory?

A. Yes.

Mr. Morrow: Defendant's Exhibit A-8 [298] in evidence.

Mr. Gantt: No objection.

The Court: A-8 may be admitted.

(Defendant's Exhibit A-8 admitted.)

(Testimony of William H. Schlaugh.)

Mr. Morrow: I would like to read this, your Honor.

The Court: All right.

Mr. Morrow: "W. R. Grace & Co., May 23, 1952. Pittsburgh Testing Laboratory, 2323 Third Avenue, Seattle, Washington, Attention Mr. M. E. Johnson. Gentlemen: With reference to our recent telephone conversation regarding a steel billet order we have placed with Seattle Foundry we understand your San Francisco office will supply you with the necessary information in order that you can make your tests. Yours very truly, W. H. Schlauch, Export Department."

Q. (By Mr. Morrow): Is that the letter, Mr. Schlaugh, you referred to as your having written to Pittsburgh Testing Laboratory on May 23, 1952?

A. Yes.

Mr. Morrow: Plaintiff's Exhibit 27? I have it. I would like to read this.

"Export Department, via air mail, San Francisco, 3295, [299] 5-26-52, steel billets, order 8881, your 9619. Our suppliers are unable to make any sense from the following paragraph contained in your above letter: 'The analysis for chemical requirement is correct while for the physical, the following is required: "The depth of chipping must not exceed $1/16$ per $1/8$ " of dimension up to a maximum of $3/4$ of 1".'"

"Please clarify.

"Yours very truly, W. R. Grace and Company, W. H. Schlauch, Export Department."

(Testimony of William H. Schlaugh.)

Q. (By Mr. Morrow): Plaintiff's Exhibit 27, is that a letter that you sent, Mr. Schlaugh?

A. Yes.

Q. With reference to that letter, what—where did you get the information contained therein?

A. From the telephone call from Mr. Murphy.

Q. And about the same time?

A. About the same time.

Q. Referring you to Plaintiff's Exhibit 28, a reply from Mr. Gips—

Mr. Morrow: May I read this, your Honor?

The Court: Yes.

Mr. Morrow: Received in Seattle, "June 3, 1952." [300]

"Gentlemen, your letter 3295. Please be advised that the paragraph to which we refer in your above mentioned letter quoted from our 9619 should have read:

"The depth of chipping must not exceed $1/17$ per inch of section to a maximum of $3/4$ of 1". Please contact suppliers and inform us when they expect this order to be ready for shipment, so that we may make timely arrangements with the New Zealand Government forwarding agent for shipment of this material. Very truly yours, W. R. Grace and Company, C. G. Gips, Export Department."

Q. (By Mr. Morrow, Continuing): That letter was received by you, was it, Mr. Schlauch?

A. Yes.

Q. What did you do in connection with that letter?

(Testimony of William H. Schlaugh.)

A. I telephoned Mr. Murphy to pass this information on.

Mr. Morrow: Plaintiff's Exhibit 29 has been admitted in evidence. "San Francisco 3321, 6/2/52. Steel Billets, order 8881, your 9647. The clause you quote regarding chipping still does not seem to be clear. It might be well to consult your testing laboratory and have them translate this into something clear and concise that will be understood by Seattle Foundry [301] Co. and by you and us as well. Yours very truly, W. R. Grace and Company, W. D. Vanderbilt, Manager."

Q. (By Mr. Morrow): Mr. Schlauch, does this letter recall to you any conversation you might have had, or did you have anything to do with that particular matter?

A. It is my recollection that I telephoned Seattle Foundry upon receipt of Plaintiff's Exhibit 28 from San Francisco. Mr. Murphy said that this clause is still not clear. Then I had a discussion with Mr. Vanderbilt about it and that is when Mr. Vanderbilt dictated this letter, which is Plaintiff's Exhibit 29, to San Francisco.

Q. Referring you to the following wire, from you to—from your Seattle office to your San Francisco office, dated July 21, 1952, being Plaintiff's Exhibit 30:

"84 Seattle Foundry advise one heat consisting of 8 billet tested by them as not over .80 manganese but Pittsburgh's test ran .85 manganese. Both tests ran .21 carbon. Suppliers request we cable for

(Testimony of William H. Schlaugh.)

buyers authority ship since more manganese actually makes stronger billet."

Did you have anything to do with that wire?

A. Yes, I did.

Q. What did you have to do with it? [302]

A. I prepared the wire.

Q. Where did you get the information therein contained?

A. I believe I obtained it from a telephone conversation from Mr. Murphy of Seattle Foundry.

Q. Did you receive a reply from your San Francisco office? A. Yes.

Q. I will ask you if this is the reply that you received, dated July 21, 1952, being Plaintiff's Exhibit 31?

The Court: I recall that if you want to show it to him.

Mr. Morrow: Do you recall it?

Q. (By Mr. Morrow, Continuing): Is that the wire you received? A. Yes, it is. [303]

* * *

Q. Now, following receipt of Plaintiff's Exhibit 31, being the wire from your San Francisco office, did you instruct Pittsburgh Testing's Representative to "* * * accept eight billets; however, no further exceptions will be allowed in the future"? Did you so advise Pittsburgh Testing Laboratory? A. Yes.

Q. I will ask you if this Plaintiff's Exhibit 32, admitted in evidence, is your advice to Pittsburgh?

(Testimony of William H. Schlaugh.)

A. Yes, it is confirmation of my advice. I advised him by telephone.

Q. Will you read it? You advised him by telephone?
A. Upon receipt of that wire.

Q. Referring to Plaintiff's Exhibit 31——

A. (Interposing): Yes.

Q. (Continuing): who did you talk to?

A. Mr. Sata.

Q. What date was it? [304] A. July 21st.

Q. Who is Mr. Sata?

A. An employee of the Pittsburgh Testing Laboratory.

Q. Now, referring you again to Plaintiff's Exhibit 32——

Mr. Morrow: Well, I will read it, if I may, your Honor.

“July 22, 1952. Pittsburgh Testing Laboratory, 2323 Third Avenue, Seattle, Washington, Attention Mr. Sata. Gentlemen: Our order 8881, steel billets, Seattle Foundry Co. We conform telephone conversation yesterday wherein we instructed you to accept for shipment the eight steel billets under Seattle Foundry's heat number 41 and which ran a manganese test of .85 instead of the allowable limits of .50/.80. Our San Francisco office have given us this authority, but they do advise that no further exception will be allowed in the future.”

Attached to this exhibit is a chemical analysis by Northwest Laboratories which I will not read unless Counsel desires it.

(Testimony of William H. Schlaugh.)

Q. (By Mr. Morrow, Continuing): Now, referring you to Plaintiff's Exhibit 33, which has been admitted in evidence, Mr. Schlaugh, will you state what the [305] occasion was, or the circumstances, rather, were under which that letter went out?

A. This letter was written at the request of Mr. Vanderbilt, the manager, supplementing my letter of July 22nd. He thought my letter of July 22nd was not all inclusive in that a loop hole might be left in it. Therefore, on July 23rd I wrote this supplementing letter.

Q. Will you read Plaintiff's Exhibit 33, please?

A. "Pittsburgh Laboratories, Attention Mr. Sata. Supplementing our letter of July 22nd regarding the eight billets under Seattle Foundry's Heat Number 41 which ran a manganese test of .85 instead of the allowable limits of .50/.80. Our buyer has authorized us to accept these billets provided they meet all the other requirements of the order."

Q. "Yours very truly, W. R. Grace and Company;" and is that your signature?

A. This is not the original letter.

Q. I see.

A. But I signed the original letter. [306]

* * *

Q. Mr. Schlaugh, I refer you to the invoices of the Seattle Foundry Company, Inc., and cancelled checks in payment thereof, being Plaintiff's Exhibit 36—

(Testimony of William H. Schlaugh.)

Mr. Morrow: Which, by the way, your Honor, is the subject of an admitted fact in the pretrial order.

Q. (By Mr. Morrow, Continuing): I will ask you if you are [307] familiar with those invoices?

A. Yes, I am.

Q. Did they come over your desk?

A. Yes.

Q. And where they approved by you before payment? A. Yes.

Mr. Morrow: I would like to read the parts of the invoices referring to the specifications, if I may, your Honor!

The Court: All right.

Mr. Morrow: "166 ASTM A-17/29, Type A, Grade 2, Size 9½" by 4" by 4' 4½" "

So many net tons and the amount. That was invoice number 04247.

Invoice number 04267, dated July 25, 1952.

"176 ASTM A-17/29, Type A, Grade 2, 9½' by 4" by 4' 1½"."

The weight and the amount and the totals.

Invoice number—4390, dated August 22, 1952.

"408 ASTM A-17/29, Type A, Grade 2, 9½" by 4' by 4½"."

Tonnage, weight, and so forth. [308]

"54 ASTM A-17/29, Type A, Grade 2, Size 6" by 3" by 10' billets."

Q. (By Mr. Morrow): Mr. Schlaugh, do these invoices represent the material you purchased from the Seattle Foundry? A. Yes.

(Testimony of William H. Schlaugh.)

Mr. Morrow: "That is all I have to ask the witness at this time.

Cross-Examination

By Mr. Gantt:

Q. Mr. Schlaugh, will you tell us how you happened to keep the exhibits 54 and 55, which have been designated and referred to as export journal and lumber journal respectively? Tell us how you made them in the course of your business. What matter you put in them as a rule.

A. Well, I will tell you why I started them. I used to write down telephone conversations on a little scrap of paper or a scratch pad and I would have a whole lot of little scratch pads on my desk and when I wanted to refer to them I would lose them and I couldn't keep good track of my conversations and sometimes there was data which I would have to write down, especially lumber specifications, size [309] and footage and prices, which I wanted to have. Therefore, I instituted the books.

Q. Well, do the little notes that you have in there, do they contain the important things or what you thought were the important points of those conversations?

A. No, not always. I think it is part of a form of doodling also. When I talk about something I usually write down maybe one or two words once in a while. It doesn't always mean it is the gist of the conversation.

(Testimony of William H. Schlaugh.)

Q. Is it then not a complete record of each conversation?

A. It is not; not, it is not a complete record.

Q. But you made those notes at the time you actually had those telephone calls?

A. In most instances, yes.

Q. Did you have those journals at your desk at all times? A. Yes.

Q. It was a rather automatic move, just to jot down as you were talking on the telephone?

A. Yes.

Q. You stated that in your experience in the export department at W. R. Grace and company you [310] hadn't handled any steel orders prior to this one; is that correct? A. That is correct.

Q. But that you had dealt with ASTM specifications before?

A. As far as dealing with them, no.

Q. Well, you had had—rephrase that this way: You had taken orders on lumber piles?

A. Piling.

Q. Piling; filled orders for your customers with lumber according to certain specifications; is that what you mean?

A. Yes; we had placed the orders with the supplier, maybe fifty pieces of piling, eighty feet, grade one, as per ASTM specification.

Q. Had you ever read any of those ASTM specifications?

A. I believe we have the one—we may have the one copy in our office pertaining only to piling.

(Testimony of William H. Schlaugh.)

Q. So that you had occasion to refer to it?

A. Actually, I think that—as I recall we got the specification later and I don't believe I referred to it more than once or twice. I actually had no occasion to.

Q. You had it on your desk though? [311]

A. No.

Q. Well, in your office?

A. In the office, yes.

Mr. Morrow: Did I understand you are referring only to ASTM for piling?

Mr. Gantt: I am referring to the one he stated he had in his office.

Q. (By Mr. Gantt): Which related to lumber piling? A. Yes.

Q. Not the one relating to steel; you didn't have that one? A. No.

Q. And you didn't consult that one at the time you were sending out your letters of inquiry?

A. No.

Q. Or at any time prior to—after this claim arose? A. No.

Q. Would that be a correct statement?

A. I never referred to it.

Q. You didn't feel that was necessary?

A. No, I did not.

Q. In other words, when you got the inquiry from San Francisco's office, which is Exhibit 2, I [312] believe, you didn't take it upon yourself to find out what ASTM specification A-17/29 meant? A. No.

(Testimony of William H. Schlaugh.)

Q. Why didn't you do that?

A. Pardon me?

Q. Why didn't you take it upon yourself to consult some source for what was meant by that particular specification?

A. I felt that the suppliers would have that information. If they were quoting me on so many steel billets as per these specifications, they would be familiar with them.

Q. But this was prior to the time you had actually sent out the letter of inquiry; you didn't consult the specification and you didn't feel it was necessary to do that? A. No.

Q. Then in fact did you know what these steel billets were at that time? A. Pardon me?

Q. Did you know what steel billets were at that time? A. No, I did not.

Q. Did you make any effort to find out?

A. No. [313]

Q. Is it customary to deal with products that you don't know what they are?

A. Yes. I mean, steel billets, going back to the inquiry, it was listed so many steel billets and they had the size and the specification, I knew that they were made out of steel and I knew they were a certain size, and if we purchased them, or if the supplier quoted us a price on the basis of these specifications, I was satisfied.

Q. Then were you relying on the supplier to furnish you the products according to the specifications? A. Yes, we were.

Q. You also stated, I believe, that the products

(Testimony of William H. Schlaugh.)

you mainly handled under prior years or in your prior employment with Grace in the export or import department in Seattle has been mainly lumber, is that correct? A. yes.

Q. And you have also dealt in wheat, flour, salmon, oats, pulp and other miscellaneous orders?

A. (Witness nodded in the affirmative.)

Q. I believe you also stated that your duty was to get quotations and products from suppliers at the lowest possible price; is that correct? [314]

A. No, it is not. I didn't want to stress that particular phase. What I meant when I said that was making the rounds, of going to—trying to—locate all possible suppliers.

Q. Was that an important factor?

A. It was to contact everybody we could that we felt could supply the product.

Q. Did you usually give the order to the lowest supplier, to the supplier who quoted you the lowest price?

A. It all depends; sometimes we did and sometimes we didn't.

Q. I believe you also testified that upon receipt of Exhibit 2, which is the letter of April 17, 1952, Mr. Gips in San Francisco requesting you to get information or to get offers on products—billets—you sent out quite a few letters. Now, Exhibit 3—excuse me, I think you have it.

A. I think I have them all.

Q. I think it is right here on the bottom. Now, Plaintiff's Exhibit 3, I believe, is four letters, or

(Testimony of William H. Schlaugh.)

copies of four letters, by you and those are to what companies, addressed to what companies?

A. Seidelhuber, Olympic Steel Works, Isaacson's and Seattle Foundry. [315]

Q. And you sent other letters out in addition to those?

A. I believe I sent letters out to the other firms listed.

Q. Now, you say "the other firms listed." You mean the other firms who appear—whose names appear in pencil on Exhibit 2?

A. That is correct.

Q. And you made all those notes? A. Yes.

Q. Those pencilled notes? A. Yes.

Q. Where are the copies of those letters?

A. I don't know.

Q. You didn't keep them?

A. Well, I think we kept them. They could not be located in the files.

Q. I believe you also testified that you found those—that you got the names of these other companies in addition to Seidelhuber and Isaacson from the telephone book? A. Yes.

Q. How did you go about that?

A. As I testified previously, I looked in the classified section under foundries. [316]

Q. Will you tell us whether you found Isaacson Iron Works and Seidelhuber—what is referred to there, Seidelhuber Iron and Bronze Works, Inc., under the telephone classified directory under foundries?

A. At that time I don't remember whether I saw

(Testimony of William H. Schlaugh.)

them or not because I knew I was going to send the inquiry to Seidelhuber and Isaacson anyway by letter. After the claim arose we had occasion to look in the telephone book at the time of my deposition and I believe we found that they were not listed.

Q. Isaacson's and Seidelhuber are not listed under steel foundries in the classified section?

A. No, they were not.

Q. How did you happen to look under steel foundries anyway?

A. I felt that was the logical place to look.

Q. Do you know the definition of the word "foundry"?

A. No, I do not.

Q. You haven't had occasion to look it up, have you?

A. No. [317]

Q. Are there other sections in the classified 'phone book dealing with steel companies in Seattle; there are, aren't there?

A. Presumably there are, yes.

Q. You didn't consult any of those though?

A. No.

Q. Now, Mr. Schlaugh, you stated that—on direct—you had received, or, rather, sent out an inquiry to N. and S. Foundry. I believe that is one of these on Exhibit 2 at the bottom of the list. Is that N. and S. Foundry?

A. Yes.

Q. You believe you sent them a letter of inquiry?

A. Yes.

Q. Did you hear from them?

A. I would have to refer to my journals. I have

(Testimony of William H. Schlaugh.)

since noted that I had a telephone conversation with them.

Q. I wonder if you will refer to your export journal, Plaintiff's Exhibit 54, and page 51, please. Is there anything appearing on that page referring to a telephone conversation with anybody?

A. Yes, there is the name Rogers, and N. and S. [318]

Q. And what is directly below that?

A. The word "sandcast."

Q. What is the date of that conversation, presumably?

A. Somewhere between April 25th and April 28th.

Q. Now, does that note indicate that the word sandcast came up in that conversation?

A. Yes, it does.

Q. And this conversation with Mr. Rogers of N. and S. Foundry had to do with the letter of inquiry you sent out to N. and S. Foundry?

A. Yes.

Q. Presumably "sandcast" had to do with the billets, as that was what you were seeking to get supplies of, is that correct?

A. I couldn't say that was correct. All I know is that it came up in the conversation and there is "sandcast."

Q. But you were making inquiry to get an offer on billets, weren't you?

A. Yes, I was.

Q. Steel billets?

A. Yes.

Q. And you don't know how the words [319] came up in the conversation?

A. At this time I can't recall.

(Testimony of William H. Schlaugh.)

Q. No independent recollection? A. No.

Q. Now, did you have occasion to hear from anyone at Seidelhuber on the telephone—by telephone conversation? A. I believe I did.

Q. I wonder if you would—would consult your notes and refresh your recollection as to that conversation? A. Yes.

Q. And will you consult page 53 of Exhibit 54, which you have before you, which would be the export journal? A. Yes.

Q. Check if there is anything there to indicate a conversation with anyone at Seidelhuber?

A. Yes, there is.

Q. Would you read that for us, please? First, give us the page you are reading from and the exhibit.

A. Page 53. The exhibit number, you mean?

Q. Yes, please. A. Exhibit 54. [320]

Q. All right.

A. Starting out with "Mr. Seidelhuber * * *"

Q. (Interposing): I wonder if you could give us approximately the date? Is there an indication on the page as to what date that might have been?

A. Yes; April 30th.

Q. April 30th; pardon me, I didn't mean to interrupt you. Will you read it now?

A. "Mr. Seidelhuber. Forging quality ingots—billet quality 1800 12 by 12-54; 65/6700 20 by 20 up to 70"; 12,000 pounds; 25 by 25 up to 59." What part of loco. Wire immediately as not on strike. Price."